Supreme Court, U.S.
FILED

981648 APR 13 1999

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No. 98 –

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

GUY MITCHELL, *et al.*,

Petitioners,

v.

MARY L. HELMS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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April 13, 1999

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QUESTION PRESENTED

Whether a program under Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 7301, *et seq.*, which provides federal funds to state and local education agencies to purchase and lend neutral, secular, and nonreligious materials such as computers, software, and library books to public and nonpublic schools for use by the students attending those schools, and which allocates the funds on an equal per-student basis, regardless of the religious or secular character of the schools the students choose to attend, violates the Establishment Clause of the First Amendment.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were:

Mary Helms, Amy Helms, and Marie Schneider - plaintiffs/appellants.

Cecil J. Picard, Louisiana Superintendent of Public Education; Kenneth Duncan, Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education - defendants/appellees/cross-appellants.

Jefferson Parish School Board System; Elton LaGasse, Superintendent of the Jefferson Parish School System; Laurie E. Rolling, President and member of the Jefferson Parish School Board; Libby Moran, Vice President and member of the Jefferson Parish School Board; Robert Wolfe, member of the Jefferson Parish School Board; Barry Bordelon, member of the Jefferson Parish School Board; O. H. Guidry, member of the Jefferson Parish School Board; Cedric Floyd, member of the Jefferson Parish School Board; Polly Thomas, member of the Jefferson Parish School Board; Gene Katsanis, member of the Jefferson Parish School Board; Martin Marino, member of the Jefferson Parish School Board - defendants/appellees/cross-appellants.

Richard W. Riley, United States Secretary of Education; and United States Department of Education - defendants/appellees.

Special Education Services Corporation - defendant/appellant.

Guy Mitchell; Jan Mitchell; Claire Friedrichs, Eddie Greer, Colleen Greer, Dennis Thornton and Darlene Thornton - intervenors/appellees/cross-appellants.

The Jefferson Parish Nonpublic Transportation Corporation - a not-for-profit corporation that is a grantee of funds from Jefferson Parish Public School System to provide school transportation to certain students attending religiously affiliated nonpublic schools - defendant.

STATEMENT PURSUANT TO RULE 29.6

There are no parent or subsidiary companies to be listed under the provisions of Rule 29.6.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

STATEMENT PURSUANT TO RULE 29.6 iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS 2

STATEMENT OF THE CASE 2

I. THE CHAPTER 2 PROGRAM 3

A. Background Of The Program 3

B. Federal, State, And Local Safeguards And Monitoring To Ensure Compliance With Chapter 2 Requirements 5

II. PROCEEDINGS BELOW 9

A. Proceedings In The District Court 9

B. Proceedings In The United States Court Of Appeals For The Fifth Circuit 11

REASONS FOR GRANTING THE WRIT 14

I. THIS IS AN IMPORTANT MATTER AS TO WHICH THERE IS NOW A DIRECT AND EXPRESS CIRCUIT CONFLICT 17

II. THE DECISION BELOW FAILS TO FOLLOW AND APPLY THE ESTABLISHMENT CLAUSE ANALYSIS MANDATED BY THIS COURT'S RECENT DECISIONS, INCLUDING, MOST RECENTLY, *AGOSTINI* v. *FELTON* 19

A. Chapter 2, Which Provides Purely Secular Materials And Equipment As Part Of A Supplemental Benefit Program Available On An Equal Basis To All Schoolchildren, Does Not Have The "Primary Effect" Of Advancing Religion. 19

B. *Meek* And *Wolman* Do Not Foreclose Application To Chapter 2 Of The Analysis Required By *Agostini* 23

C. An Interpretation Of *Meek* And *Wolman* To Preclude The Educational Aid Program At Issue Here Would Produce An Anomalous, Impractical Result Inconsistent With Subsequent Decisions Of This Court 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Agostini v. Felton,
521 U.S. 203 (1997) ..... *passim*

Aguilar v. Felton,
473 U.S. 402 (1985),
overruled sub nom.,
Agostini v. Felton,
521 U.S. 203 (1997) 29

Andrews v. Louisville & Nashville R.R.,
406 U.S. 320 (1972) 27

Board of Education v. Allen,
392 U.S. 236 (1968) ..... *passim*

Bowen v. Kendrick,
483 U.S. 1304 (1987)
(Rehnquist, C.J., in Chambers) 17

Bowen v. Kendrick,
487 U.S. 589 (1988) 29

Committee for Public Education
& Religious Liberty v. Nyquist,
413 U.S. 756 (1973) 24

Committee for Public Education
& Religious Liberty v. Regan,
444 U.S. 646 (1980) 14, 26, 27

Everson v. Board of Education,
330 U.S. 1 (1947) 28

Helms v. Picard,
151 F.3d 347 (5th Cir. 1998) 1

Helms v. Picard,
165 F.3d 311 (5th Cir. 1999) 1

Lemon v. Kurtzman,
403 U.S. 602 (1971) 12, 19, 20

Meek v. Pittenger,
421 U.S. 349 (1975) ..... *passim*

Mueller v. Allen,
463 U.S. 388 (1983) 21, 27, 29

Public Funds for Public Schools v. Marburger,
358 F. Supp. 29 (D. N.J. 1973),
aff'd, 417 U.S. 961 (1974) 24

Rosenberger v. Rector & Visitors
of the University of Virginia,
515 U.S. 819 (1995) 11, 29

School District of Grand Rapids v. Ball,
473 U.S. 373 (1985),
overruled in part sub nom.,
Agostini v. Felton,
521 U.S. 203 (1997) 29

Walker v. San Francisco Unified School District,
46 F.3d 1449 (9th Cir. 1995) ..... *passim*

Walz v. Tax Commissioner,
397 U.S. 664 (1970) 28

Witters v. Washington Department
of Services for the Blind,
474 U.S. 481 (1986) 19, 20, 21, 23, 29

Wolman v. Walter,
433 U.S. 229 (1977) ..... *passim*

Zobrest v. Catalina Foothills School District,
509 U.S. 1 (1993) ..... *passim*

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. I 2

Title I of the Augustus F. Hawkins-Robert T.
Stafford Elementary and Secondary
School Improvement Amendments of 1988,
Pub. L. No. 100-297, 102 Stat. 130 (1988),
codified at former 20 U.S.C. § 2911, *et seq.* 3

20 U.S.C. § 2972(a) 4

20 U.S.C. § 2972(b) 4

Education Consolidation and Improvement Act of 1981,
codified at former 20 U.S.C. §§ 3811-3816 3

Chapter 2 of Title I of the Elementary
and Secondary Education Act of 1965,
re-enacted at Subchapter VI of the
Improving America's Schools Act
of 1994, Pub. L. No. 103-382, 108 Stat. 3519,
codified at 20 U.S.C. §§ 7301-7373 (1994) 1, 2, 4, 10

20 U.S.C. § 7301 4

20 U.S.C. § 7301(c) 7

20 U.S.C. § 7311(b) 4

20 U.S.C. § 7312(a) 4

20 U.S.C. § 7312(b) 4

20 U.S.C. § 7332(a)(2)(A) 7

20 U.S.C. § 7332(a)(4) 6

20 U.S.C. § 7332(a)(6) 6

20 U.S.C. § 7351 4

20 U.S.C. § 7351(b)(2) 5

20 U.S.C. § 7353(a)(1)(B)(3) 6

20 U.S.C. § 7353(a)(1)(B)(4) 6

20 U.S.C. § 7371(b) 6, 22

20 U.S.C. § 7372 4

20 U.S.C. § 7372(a)(1) 6

20 U.S.C. § 7372(c)(1) 6

28 U.S.C. § 1254(1) (1994) 1

28 U.S.C. § 1331 (1994) 9

28 U.S.C. § 1391(e) (1994) 9

28 U.S.C. § 2201 (1994) 9

42 U.S.C. § 1983 (1994) 9

REGULATIONS

34 C.F.R. § 299.8(a) (1998) 6

34 C.F.R. § 299.9(a) (1998) 6

34 C.F.R. § 299.9(c)(1) (1998) 6

LEGISLATIVE MATERIALS

S. Rep. No. 89-146 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1446 3

TREATISES

Robert L. Stern, *et al.*, Supreme Court Practice (7th ed. 1993) 18

PETITION FOR A WRIT OF CERTIORARI

Petitioners Guy Mitchell, Jan Mitchell, Claire Friedrichs, Eddie Greer, Colleen Greer, Dennis Thornton, and Darlene Thornton respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case, insofar as it held that Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 7301, *et seq.*, is unconstitutional.

OPINIONS BELOW

The decision of the Fifth Circuit is reported as *Helms v. Picard*, 151 F.3d 347 (5th Cir. 1998), and is reprinted at pages 1a-78a of the appendix to this petition ("Pet. App."). The order of the Fifth Circuit denying the petitions for rehearing and suggestions for rehearing *en banc* is reported as *Helms v. Picard*, 165 F.3d 311 (5th Cir. 1999), and is reprinted at Pet. App. 152a-155a. The opinion of the United States District Court for the Eastern District of Louisiana is unreported, and is reprinted at Pet. App. 79a-118a. The prior opinions by the United States District Court for the Eastern District of Louisiana on this subject are also unreported and are reprinted at Pet. App. 119a-136a and 137a-151a.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was issued on August 17, 1998. Pet. App. 1a-78a. The Court of Appeals denied a timely motion for rehearing and suggestion for rehearing *en banc* on January 13, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The First Amendment to the United States Constitution provides in pertinent part that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

The text of the relevant portions of the Elementary and Secondary Education Act of 1965 as amended, 20 U.S.C. § 7301, *et seq.*, and of selected federal regulations implementing the statute, is reprinted at Pet. App. 157a-193a.

STATEMENT OF THE CASE

Petitioners Guy Mitchell, Jan Mitchell, Claire Friedrichs, Eddie Greer, Colleen Greer, Dennis Thornton, and Darlene Thornton are parents of children attending nonpublic, religiously affiliated schools in Jefferson Parish, Louisiana. Under Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 7301, *et seq.*, petitioners' children – along with millions of children nationwide, including more than a million students enrolled in private, religiously affiliated schools – are given enhanced access to library books, computers, and computer software. This federal program has been in existence in different forms for 33 years and, during that time, has immeasurably advanced the congressional goal of ensuring that all schoolchildren – regardless of the public or private, religious or secular nature of their educational choices – have access to instructional materials and equipment appropriate to this technological age. In direct conflict with a decision of the Court of Appeals for the Ninth Circuit, *Walker v. San Francisco Unified School District*, 46 F.3d 1449 (9th Cir. 1995), the Fifth Circuit held that this program is

unconstitutional as applied to children attending religiously affiliated schools. The effect of the decision below, if not reversed, will be to disrupt the administration of this important federal statute, to impede achievement of Congress's educational objectives for all schoolchildren, to deny technologically sophisticated educational tools to over a million American schoolchildren, and to require discrimination against some schoolchildren solely on the basis of their families' constitutionally protected decision to choose an education under religious auspices.

I. THE CHAPTER 2 PROGRAM

A. Background Of The Program

Chapter 2 has its origins in the legislative response to President Johnson's January 12, 1965 "education message," calling for a national program to improve educational opportunities for America's youth. *See, e.g.*, S. Rep. No. 89-146 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1446, 1448-49. Congress responded by enacting the Elementary and Secondary Education Act of 1965 ("ESEA") to "improve the education of young Americans." *Id.* at 1448. Chapter 2 was enacted in the Education Consolidation and Improvement Act of 1981 ("ECIA") *former* 20 U.S.C. §§ 3811-3816, which consolidated several federal education programs into one providing education block grants to states for specified purposes, including the acquisition of school library resources, textbooks, and other instructional materials and equipment. Chapter 2 provided for these materials to be purchased by public school authorities and loaned by them to public and nonpublic schoolchildren throughout the nation. Congress has periodically reauthorized Chapter 2 in subsequent federal aid-to-education legislation.[1]

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[1] After the ECIA, Chapter 2 was again reauthorized by Title I of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No.

Chapter 2 provides financial assistance through "block grants" to state education agencies ("SEAs") and local education agencies ("LEAs") (which are typically school districts) in several areas of "targeted assistance." *See* 20 U.S.C. §§ 7301, 7351. The amount of Chapter 2 funds allocated to beneficiaries is determined on an objective basis. States receive Chapter 2 funds in accordance with the total number of children aged five to seventeen in the state. *See* 20 U.S.C. § 7311(b). Funds are allocated to LEAs based on the number of participating elementary and secondary school students (including both public and private, nonprofit schools) with adjustments made on the basis of the number of children from low income families, living in areas with high concentration of low income families or living in sparsely populated areas. *See* 20 U.S.C. § 7312(a)-(b); *see also* Pet. App. 87a. In keeping with its purpose of improving educational benefits for all schoolchildren, Chapter 2 specifically provides "for the participation of private school students on an equitable basis, with equal expenditures for private and public school students." *Walker*, 46 F.3d at 1454 (*citing former* 20 U.S.C. § 2972(a)-(b)). *See also* 20 U.S.C. § 7372.

As the statutory language implies, the vast majority of schoolchildren who benefit from the federal Chapter 2 program are those attending public schools. In Louisiana, more than 70 percent of Chapter 2 funds are spent for the

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100-297, 102 Stat. 130 (1988), *codified at former* 20 U.S.C. § 2911, *et seq.* *See Walker*, 46 F.3d at 1452 n.1. Most recently, Chapter 2 was reauthorized as Title VI of the Improving America's Schools Act of 1994 ("IASA"), Pub. L. No. 103-382, 108 Stat. 3519, *codified at* 20 U.S.C. §§ 7301-7373 (1994). To be consistent with the Fifth Circuit's decision, petitioners will refer to current IASA Subchapter VI as "Chapter 2" and will cite to the currently operative IASA provisions.

benefit of public school students. *See* Pet. App. 108a. *See also Walker*, 46 F.3d at 1467 (finding that in 1988-89, 74 percent of Chapter 2 benefits went to public school students). Nationwide, millions of children receive benefits under the Chapter 2 program. Of those, the vast majority attend public schools and private nonsectarian schools.

Among other forms of assistance not at issue here, Chapter 2 provides funding to public educational agencies for "the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials . . . ." 20 U.S.C. § 7351(b)(2). As of the close of the record in 1990 (and currently), the only Chapter 2 benefits that were being provided for nonpublic schoolchildren in Jefferson Parish were library books, instructional materials, reference materials, and computer software and hardware. *See* Jarreau Declaration ("Decl.") attachment ("attach.") D to Doc. 179.[2] Books, software, and other materials are selected by officials at the schools where they will be used from among a list of available materials prescreened by public education officials as appropriate for use in both public and nonpublic schools. Those selections are again reviewed by a public school official before orders are placed. Title to the materials remains in the public agency.

B. Federal, State, And Local Safeguards And Monitoring To Ensure Compliance With Chapter 2 Requirements

The Chapter 2 statute and the federal Department of Education's implementing regulations contain extensive

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[2] Citations to "Doc." refer to the document number on the district court's docket sheet. All cited documents are part of the record.

safeguards to ensure that Chapter 2 funds achieve the statutory purpose of providing supplemental secular educational benefits to all schoolchildren, including those attending nonpublic, religiously affiliated schools.

- All Chapter 2 materials provided must only "supplement," and may not "supplant funds from non-federal sources." 20 U.S.C. § 7371(b); *see also* 34 C.F.R. § 299.8(a) (1998).

- All Chapter 2 materials must be "secular, neutral and nonideological." 20 U.S.C. § 7372(a)(1); *see also* 34 C.F.R. § 299.9(c)(1) (1998).

- Title to all Chapter 2 materials and equipment remains with public school (LEA) officials. 20 U.S.C. § 7372(c)(1); 34 C.F.R. § 299.9(a) (1998).

- SEAs must certify in their application for Chapter 2 funds that they "will keep such records and provide such information to the Secretary [of Education] as may be required for fiscal audit and program evaluation," 20 U.S.C. § 7332(a)(4), and "that there is compliance with the specific requirements of" Chapter 2, *id.* § 7332(a)(6).

- Each LEA must include in its application to an SEA for Chapter 2 funds assurances that the LEA will comply with the provisions of Chapter 2 and that it will maintain such reasonable records as may be required for audits. *See* 20 U.S.C. § 7353(a)(1)(B)(3)-(4).

- LEAs are required to report annually to SEAs on their use of Chapter 2 targeted assistance funds, and SEAs in turn are required to report biennially to the federal Department of Education. *See* 20 U.S.C. § 7332(a)(2)(A).

Louisiana also has adopted safeguards to assure that Chapter 2 funds are used to provide the secular, nonideological benefits contemplated by the statute. These additional state-level safeguards include:

- The promulgation of written Chapter 2 Guidelines, which are distributed to all LEAs. *See* Ex. D-4 attach. to Doc. 179.

- In-service training for all LEA Chapter 2 coordinators concerning, among other things, prohibitions on religious use of funds and materials. *See id.*; Lewis 6/19/89 Dep. 19 attach. to Doc. 165.

- Obtaining written assurance from each LEA that its Chapter 2 program complies with all statutory requirements, including those governing the participation of private school students. *See* Ex. D-4 at 28 attach. to Doc. 179.

- A systematic program of periodic written reporting and on-site monitoring, including biennial LEA site visits by State Chapter 2 administrators. Pet. App. 88a; *see also* Ex. D-4 at 26-89 attach. to Doc. 179; Lewis 1/12/89 Dep. 103 and Ex. 11 attach. to Doc. 165.

Under Chapter 2, LEAs such as the Jefferson Parish Public School System ("JPPSS") have primary "responsibility for the design and implementation" of Chapter 2 programs. 20 U.S.C. § 7301(c). The JPPSS LEA has implemented additional procedures to ensure that Chapter 2 materials and equipment are properly used, including:

- Annual orientation sessions for nonpublic Chapter 2 contact personnel concerning Chapter 2's statutory and regulatory requirements. *See* Woodward 4/1/87 Dep. Ex. 3 attach. to Doc. 165.

- Requiring the signed assurance from the nonpublic school officials that all material and equipment will be used in "direct compliance" with Chapter 2 and that "Chapter 2 activities, equipment, and materials will only be used for secular, neutral and nonideological purposes." Ex. D-4 at 85 attach. to Doc. 179.

- Annual written reminders to nonpublic schools that Chapter 2 prohibits the acquisition of any religiously oriented material and that Chapter 2 equipment and materials may be used only for "secular, neutral and non-ideological" Chapter 2 purposes. Woodward 4/1/87 Dep. at 63 & Exs. 3, 5 attach. to Doc. 165.

- Provision of Chapter 2 funds exclusively to public education agencies, with no Chapter 2 funds going to any nonpublic (or public) school. *See* Woodward 4/1/87 Dep. 207 attach. to Doc. 165.

- Library books for use by nonpublic schoolchildren in Jefferson Parish must be ordered by submitting requests to the public LEA, which places orders from catalogs that are provided by "book jobbers" that are under contract with the JPPSS. *See* Woodward Decl. ¶¶ 3-5, Ex. UU attach. to Doc. 178; Woodward 4/1/87 Dep. 38 attach. to Doc. 165.

- Review by JPPSS officials of all requests for library books and instructional materials made on behalf of nonpublic schoolchildren and deletion of any item

that might indicate religiously-oriented material. *See* Woodward Decl. ¶ 5; Ex. UU attach. to Doc. 178; Woodward 4/1/87 Dep. 88-89 attach. to Doc. 165.

- Marking of all Chapter 2 purchased materials and equipment to identify them as Chapter 2 property owned by public authorities. *See* Woodward 4/1/87 Dep. 98 attach. to Doc. 165.

- Requiring schools to maintain records of use of Chapter 2 materials and equipment. *See id.*

- Annual monitoring visits by the JPPSS monitors, including interviews, reviews of equipment and materials and recording of use, and random sampling of books purchased with Chapter 2 funds for religious content. *See id.* at 99, 112-141; Woodward Decl. ¶ 6, Ex. UU attach. to Doc. 178.

II. PROCEEDINGS BELOW

A. Proceedings In The District Court

Respondents filed their initial Complaint in December 1985,[3] and filed a Second Amended and Supplemental Complaint on December 28, 1988, claiming jurisdiction under 28 U.S.C. §§ 1331, 1391(e), and 2201 (1994) and 42 U.S.C. § 1983 (1994). The named defendants included federal, state, and local educational authorities responsible for administering the challenged programs.[4]

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[3] Plaintiffs Mary L. Helms, Amy T. Helms, and Marie L. Schneider sued solely in their capacity as federal, state, and local taxpayers. *See* Doc. 337.

[4] The federal defendants include Richard Riley, United States Secretary of Education, and the United States Department of Education. The state defendants include Cecil J. Picard, Louisiana

Petitioners, who are parents of children who attend religiously affiliated schools and benefit from the challenged programs, intervened to defend the constitutionality of the programs.[5]

Among other challenges not relevant here, respondents claimed that the federal Chapter 2 program, 20 U.S.C. §§ 7301-7373, as applied and administered in Jefferson Parish, Louisiana, violates the Establishment Clause. They moved for partial summary judgment on their claims regarding Chapter 2. Petitioners and the federal defendants cross-moved for summary judgment on those claims.

On March 27, 1990, shortly before the scheduled trial date, the district court (Heebe, C.J.) granted respondents' motion and denied the cross-motions. *See* Pet. App. 137a-151a. The court was of the view that no assistance to the educational functions of "pervasively sectarian" schools is permissible under the First Amendment, no matter how carefully designed and delivered. Pet. App. 149a-150a. Petitioners and the federal defendants moved for reconsideration and to alter or amend the district court's judgment with respect to the Chapter 2 program. The court granted a partial stay of the judgment with respect to the Chapter 2 program, and ordered a bench trial on remaining

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Superintendent of Public Education, Kenneth Duncan, Louisiana State Treasurer, and the Louisiana Board of Elementary and Secondary Education. The local defendants include Superintendent Elton LaGasse and the members of the Jefferson Parish School Board.

[5] Petitioners Guy Mitchell and Jan Mitchell were parents of children attending religiously affiliated schools and eligible for Chapter 2 benefits at the time, and remain so. Claire Friedrichs, Eddie Greer, Colleen Greer, Dennis Thornton and Darlene Thornton were substituted for original intervenors Eugene Cerise and Kathy Cerise and are also petitioners here.

issues. Petitioners moved for reconsideration. Other than the formal entry of judgment, there were no further opinions on the Chapter 2 portion of the case for almost seven years after the partial summary judgment, during which time Chief Judge Heebe retired from the bench and the case was reassigned to District Judge Livaudais.

On January 28, 1997, based on supervening precedent, Judge Livaudais granted the motions for reconsideration filed by petitioners and the federal defendants and vacated Judge Heebe's Order and Reasons, including the findings of fact. *See* Pet. App. 79a-118a. Judge Livaudais granted the cross-motions of petitioners and the federal defendants for partial summary judgment, and dismissed respondents' claims with respect to Chapter 2. *See id.* In his view, the design and implementation of the program provided adequate assurance that educational assistance could be provided to all students, including those who attend religiously affiliated schools. *See* Pet. App. 106a-108a. In reaching that conclusion, Judge Livaudais relied on this Court's recent decisions in *Zobrest v. Catalina Foothills School District.*, 509 U.S. 1 (1993), and *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), and on the Ninth Circuit's decision in *Walker*, in which the court rejected a virtually identical Establishment Clause challenge to a California Chapter 2 program. Pet. App. 102a-108a. On January 29, 1997, the court entered an amended judgment dismissing respondents' claims with respect to Chapter 2. Respondents appealed.

B. Proceedings In The United States Court Of Appeals For The Fifth Circuit

On August 17, 1998, the Fifth Circuit reversed Judge Livaudais' ruling and held the Chapter 2 program unconstitutional as operated in Jefferson Parish. Pet. App. 71a. In reaching this decision, the court relied on *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433

U.S. 229 (1977), which it read as drawing a categorical line between state programs lending textbooks for the use of students in parochial schools, which the court concluded are constitutionally permissible, and "programs lending instructional materials *other than textbooks* to parochial schools and schoolchildren," which are constitutionally forbidden. Pet. App. 67a (emphasis in original). The court acknowledged that this Court's most recent relevant precedent, *Agostini v. Felton*, 521 U.S. 203 (1997), "discard[ed] a premise on which *Meek* relied – *i.e.*, that '[s]ubstantial aid to the educational function of [sectarian] schools ... *necessarily* results in aid to the sectarian school enterprise as a whole.'" Pet. App. 70a (quoting *Meek*, 421 U.S. at 366) (emphasis in original). Indeed, in another section of the opinion, the court of appeals noted that this Court has "abandoned three of the assumptions which underlay the second ('effects') prong of *Lemon* [*v. Kurtzman*, 403 U.S. 602 (1971)]." Pet. App. 43a. The court explained:

> Fairly restated, the post-*Agostini Lemon* test includes the first ("secular purpose") prong plus the following, re-tooled "effects" prong:
>
> [does the aid] result in governmental indoctrination[?]; [does the aid] define its recipients by reference to religion [?]; or [does the aid] create an excessive entanglement [?].

Pet. App. 44a (brackets in original) (quoting *Agostini*, 521 U.S. at 234). However, the court of appeals declined to apply the "restated . . . post-*Agostini Lemon* test." The court refused even to address the argument of petitioners and the federal defendants that the substantial safeguards in the Chapter 2 program satisfy the criteria articulated in *Agostini* for constitutionality under the Establishment Clause.

Rather than apply the constitutional analysis set forth by this Court in *Agostini* to the factual circumstances of this case, the court of appeals interpreted *Agostini* as having no significance beyond the specific facts of that case. The court of appeals stated that "*Agostini holds* only that the aid at issue there (*i.e.*, the on-premises provision of special education services by state-paid teachers) was not the kind of governmental aid that impermissibly advanced religion." Pet. App. 70a (emphasis in original). "*Agostini* says nothing about the loan of instructional materials to parochial schools." *Id.* Because *Agostini* "does not even address" the issue of instructional materials other than textbooks, *id.*, the court of appeals concluded that it was required to follow *Meek* and *Wolman*, even if the analytical premises underlying those decisions had been "discarded" by this Court. Accordingly, because Chapter 2 involves "instructional materials" (disapproved in *Meek*) and not textbooks (approved in *Board of Education v. Allen*, 392 U.S. 236 (1968)) or special education services by state-paid teachers (approved in *Agostini*), the court concluded that this long-established and successful program is unconstitutional.

In reaching that conclusion, the Fifth Circuit acknowledged that the Ninth Circuit had upheld "a Chapter 2 program that was, in all relevant respects, identical to the one we confront in Jefferson Parish." Pet. App. 59a. In *Walker*, the Ninth Circuit rejected the argument that this Court's decisions create a rigid dichotomy between textbooks and other instructional materials.[6] Instead, finding that benefits

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[6] The Ninth Circuit distinguished *Meek* and *Wolman* on the ground that they involved aid targeted to nonpublic schools. *See Walker*, 46 F.3d at 1468. In addition, the court found that *Meek*'s dichotomy between textbooks and other instructional materials had been undermined by this Court's decisions in *Wolman* (upholding state aid for academic tests in secular subjects), *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646 (1980) (upholding cash reimbursements for tests),

under the Chapter 2 program were "neutrally available without regard to religion," that the constraints under which Chapter 2 services are provided "adequately safeguard Chapter 2 benefits from improper diversion to religious use," and that any "symbolic union between government and religion" created by Chapter 2 is no greater than that in other cases where aid has been upheld by this Court, *id.* at 1467-68, the Ninth Circuit held that the program is permissible under the Establishment Clause.

The court below declined to follow the Ninth Circuit's decision, labeling its reasoning "flawed." Pet. App. 68a. Despite this acknowledged conflict in the circuits, the court of appeals denied motions for rehearing and suggestions for rehearing *en banc*. Pet. App. 152a. This petition follows.

REASONS FOR GRANTING THE WRIT

This case vitally affects the quality of education available to over a million schoolchildren nationwide. Congress has wisely recognized that the national interest is served when *all* schoolchildren have access to supplementary educational resources and equipment in keeping with this fast-moving, technological age, without regard to whether their schools are public or private, religious or secular. Accordingly, since its inception, Chapter 2 and its predecessor programs have adapted the nature of the assistance provided to changes in educational and communications technology. In the 1960s, when this Court first confronted the question of what types of instructional materials may be provided for the use of children in religiously affiliated schools, the principal tool of learning was the textbook. *See Board of Education v. Allen*, 392 U.S. 236 (1968). Later, in the 1970s, schools increasingly began

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and *Zobrest* (upholding state-provided sign language interpreter for deaf student). *See id.* at 1465-66.

to use such items as video equipment, film projectors, tape recorders, and television. *See Meek v. Pittenger*, 421 U.S. 349 (1975); *Wolman v. Walter*, 433 U.S. 229 (1977). Today, the Chapter 2 program is devoted in large part to the loan of computers and computer software, as well as traditional library books. Who knows what the educational tools of the future may be?

Under the decision below, Congress's ability to pursue this national interest is forever frozen in the technology of *Board of Education v. Allen*. Textbooks, the court holds, are permissible, but any form of instructional material developed since the time of *Allen* is constitutionally forbidden. *See* Pet. App. 71a. Despite Congress's worthy intention to serve *all* schoolchildren, without discrimination, the decision below consigns those who attend religiously affiliated schools to the use of textbooks under the program, while children of other taxpayers are using graphing calculators to solve polynomial equations and reading about the latest in Mesopotamian archeological discoveries on CD-ROMs.

It is difficult to perceive what principles are advanced by the decision below. The decision does not protect taxpayers, since it does not reduce the amount of tax money that will be spent for the benefit of students attending nonpublic schools; it only prevents those funds from being used for up-to-date pedagogical resources. The decision is irrelevant to the constitutional purpose of ensuring that the power of the state not be used to favor or endorse religion, since Chapter 2 is scrupulously neutral with respect to religion, allocating its benefits on the basis of strict objective criteria. The decision does nothing to ensure that public funds are used only for neutral, nonideological education; the court of appeals paid no attention to the safeguards in the program, and the alternative ways the funds might be used (including the purchase of textbooks) present no less (and no more) danger of infringing constitutional concerns than the

provision of computers, software, and library books. And it certainly does not advance the cause of religious liberty to discriminate in this way against families who exercise their constitutional right to choose religiously affiliated schools.

Certiorari is especially warranted because the decision below expressly conflicts with the decision of the United States Court of Appeals for the Ninth Circuit in *Walker*. As the court below stated, *Walker* upheld against Establishment Clause challenge "a Chapter 2 program that was, in all relevant respects, identical to the one we confront in Jefferson Parish." Pet. App. 59a.

The Court also should grant the petition because the decision below conflicts with and misapplies several decisions of this Court. In particular, the court below failed to apply the Establishment Clause analysis mandated by this Court in *Agostini*. Instead, it interpreted this Court's decisions in *Meek* and *Wolman* to establish a special rule, unmoored from the analytic framework set forth in *Agostini* and other recent decisions, that any program that loans instructional materials, equipment, or supplies other than textbooks for the use of children in religiously affiliated schools violates the Establishment Clause. It treated *Agostini* as applying only to the narrow issue of "on-premises provision of special educational services to state-paid teachers." Pet. App. 70a. This Court should grant the petition to clarify that *Agostini* sets forth the Establishment Clause analysis applicable to aid-to-education programs and to clarify that lower courts are not entitled to treat this Court's decisions as confined to their precise facts.

More sympathetically, the decision below can be understood as a plea for guidance from this Court. In unusually candid language, Judge Duhé's opinion for the Fifth Circuit declared that "it is tempting to complain that the high Court has instructed us confusingly." Pet. App. 65a. "When we view the deceptively simple words of the

Establishment Clause through the prism of the Supreme Court cases interpreting them, the view is not crystal clear," the opinion lamented, and "as a Circuit Court bound by the High Court's commandments we must proceed in fear and trembling." *Id.* In particular, the lower court was uncertain about how to reconcile recent decisions, which have altered Establishment Clause jurisprudence in major respects, with past precedents that were based on now-discarded premises. This was the view of the "reluctant[]" dissent in *Walker* as well. *Walker*, 46 F.3d at 1470 (Fernandez, J., dissenting) (terming any distinction between the books programs in *Allen* and the Chapter 2 instructional materials program "untenable" but "reluctantly" concluding that only "the Supreme Court must take away" the distinction). This Court should grant certiorari to provide the guidance the lower courts so evidently require.

I. THIS IS AN IMPORTANT MATTER AS TO WHICH THERE IS NOW A DIRECT AND EXPRESS CIRCUIT CONFLICT.

Chapter 2 is a fixture of the modern educational system. For the last 33 years, virtually every child between the ages of 5 and 17 in this country – whether attending public or nonpublic schools – has had the opportunity to benefit from Chapter 2 or its predecessor programs. Currently, millions of students nationwide, including over a million attending religiously affiliated schools, receive benefits under the program. The decision below holds these longstanding practices unconstitutional. Under the court of appeals' reasoning, many schoolchildren in the Fifth Circuit now face possible discontinuation of benefits under this aid-to-education program.

In light of the presumption of constitutionality that attaches to all Acts of Congress, this Court almost invariably reviews decisions of lower courts holding federal statutes unconstitutional. *See Bowen v. Kendrick*, 483 U.S. 1304

(1987) (Rehnquist, C.J., in Chambers) (noting that where a federal statute has been held unconstitutional, it is likely both that the Court would review the decision and that it would grant a stay); Robert L. Stern, *et al.*, Supreme Court Practice § 4.12 at 185 (7th ed. 1993). Where, as here, Congress has reconsidered and reauthorized the program in different forms on four separate occasions over a period of more than three decades,[7] the deliberate judgment of that body is entitled to particular respect. Moreover, in light of the long history of successful operation and administration of Chapter 2, and the disruption that would be entailed by a finding of unconstitutionality, this Court should not allow the decision below to go unreviewed.

The need for review is heightened in this case because the decision directly conflicts with the Ninth Circuit's decision in *Walker*. The court below expressly recognized that the Chapter 2 program at issue in *Walker* "was, in all relevant respects, identical to the one we confront." Pet. App. 59a. Yet, notwithstanding the identity of the statutory provisions at issue in the cases, the Fifth Circuit expressly rejected the analysis and result in *Walker*. *See* Pet. App. 68-70a.

There is here, then, a clear and acknowledged conflict among the circuits concerning the constitutionality of an important federal aid-to-education program that benefits children throughout the nation. The Court should grant this petition to resolve that conflict.

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[7] *See supra* p. 3 & n.1.

II. THE DECISION BELOW FAILS TO FOLLOW AND APPLY THE ESTABLISHMENT CLAUSE ANALYSIS MANDATED BY THIS COURT'S RECENT DECISIONS, INCLUDING, MOST RECENTLY, *AGOSTINI v. FELTON*.

The Ninth Circuit's *Walker* holding is not the only one with which the decision below conflicts: the decision below also conflicts with this Court's decisions in *Agostini, Zobrest,* and *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986). Most pointedly, the court below refused to apply to Chapter 2 the Establishment Clause test mandated by this Court in *Agostini*. *See* Pet. App. 70a-71a. This Court should grant the petition in order to reaffirm that the analysis set forth in *Agostini* and its precursors must be applied here, and to clarify that the results reached in the particular factual circumstances of *Meek* and *Wolman* do not require the invalidation of all aid-to-education programs involving instructional materials and equipment other than textbooks.

A. Chapter 2, Which Provides Purely Secular Materials And Equipment As Part Of A Supplemental Benefit Program Available On An Equal Basis To All Schoolchildren, Does Not Have The "Primary Effect" Of Advancing Religion.[8]

As the court below recognized, Pet. App. 44a, in *Agostini* this Court modified the three-part analysis of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), for evaluating the

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[8] There is no dispute that Chapter 2 has a secular purpose of improving educational opportunities for all schoolchildren. *See supra* p. 3. Thus, the sole issue below was whether the program has the "primary effect" of advancing religion under *Agostini*'s three-part "effects" analysis.

constitutionality of a program under the Establishment Clause. *Lemon* stated that:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.'

Lemon, 403 U.S. at 612-13 (citation omitted). *Agostini* clarified the factors relevant to the analysis of a program's "primary effect" by identifying

> three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.

Agostini, 521 U.S. at 234. The program challenged here plainly satisfies these criteria.

Chapter 2 "does not define its recipients by reference to religion." *Agostini*, 521 U.S. at 234. As the district court found, Chapter 2 is an educational benefit program available to all schoolchildren and whose beneficiaries overwhelmingly are public school students. *See supra* p. 4. Indeed, benefits under Chapter 2 are strictly allocated according to school-age population, number of participating students, and (with respect to a portion of the program) number of participating students from low-income families. This means that, like the programs in *Witters* and *Agostini*, under this program any benefit that ultimately goes to religious institutions does so "only as a result of the genuinely independent and private choices of individuals."

Agostini, 521 U.S. at 226 (citations and internal quotation marks omitted); *see also Witters*, 474 U.S. at 487. Government officials have no discretion in the matter, and therefore no ability to promote (or inhibit) religious as compared to secular education. Congress's intention is to assist schoolchildren, and the schoolchildren carry their entitlement wherever they go.

The neutrality of the funding formula is relevant in two different ways. First, since the operative decisions about what type of institution in which to obtain the benefits of the Chapter 2 program are made by individual families, not the state, any incidental advancement of religion cannot be attributed to the government. *Agostini*, 521 U.S. at 230-31. Second, since benefits are provided to all schoolchildren without discrimination, the program creates no financial incentive to choose education under religious auspices. *See id*; *see also Witters*, 474 U.S. at 488; *Zobrest*, 509 U.S. at 10; *Mueller v. Allen*, 463 U.S. 388, 399 (1983).

Similarly, the Chapter 2 program "does not result in governmental indoctrination" of religion. *Agostini*, 521 U.S. at 234. Unlike the programs at issue in *Agostini* and *Zobrest*, this program does not involve state-paid teachers or personnel. There is therefore even less danger of governmental indoctrination than in those cases.[9] To be

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[9] Under the rubric of "governmental indoctrination," the Court is concerned about whether the government itself, or its officials or employees, is the source of religious content. It is not concerned about religious content that derives from private sources, such as private schools. Thus, in *Zobrest*, the question in dispute was whether the sign language interpreter would independently impart religious messages or a religious viewpoint – not whether the interpreter would be useful in conveying the religious messages of the private school to the student. Similarly, in *Allen*, the Court was concerned that the books supplied by the government not

sure, government officials are involved in the selection of books and other materials under Chapter 2. But the statute ensures that any books, materials, or equipment purchased by public school authorities with Chapter 2 funds must be "secular, neutral and nonideological." *See supra* p. 6. Indeed, the books and materials are chosen from a list prescreened for availability in both public and nonpublic schools. Moreover, as discussed above, federal, state, and local officials have implemented effective screening and monitoring procedures that, individually and collectively, operate to provide reasonable assurance that reference books and materials and equipment loaned for use by students attending nonpublic schools comply with this statutory requirement. *See supra* pp. 5-9. These safeguards eliminate any serious possibility of governmental indoctrination. *See Walker*, 46 F.3d at 1467-68 (finding that comparable procedures provided sufficient assurance that operation of Chapter 2 program would not have primary effect of advancing religion).

Moreover, Chapter 2 benefits are limited to materials that "supplement, not supplant" funds from non-federal sources. 20 U.S.C. § 7371(b). This ensures that aid will not "indirectly finance religious education" by "reliev[ing] the sectarian schools of costs they otherwise would have borne in educating their students." *Agostini*, 521 U.S. at 226 (citations and internal quotation marks omitted); *Zobrest*, 509 U.S. at 12. No funds go to religious schools under Chapter 2. The funds go to state and local education agencies, which purchase the instructional materials and equipment and lend them to the individual schools. Title to the materials and equipment remains in the local education agency.

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contain religious indoctrination; it made no inquiry into how those books were *used* by teachers in the religious schools.

Finally, the Chapter 2 program plainly does not present any risk of "excessive entanglement." *Agostini*, 521 U.S. at 234. The annual monitoring visits by public school district employees, their screening activities, and the biennial visits by Louisiana monitors to religiously affiliated schools, *see supra* pp. 5-9, are far less intrusive than the monthly on-site visits the Court has held do *not* involve "excessive entanglement." *Agostini*, 521 U.S. at 234.

Had the court of appeals applied *Agostini*, *Zobrest*, and *Witters*, therefore, it would have reached a different result. The petition should be granted because the decision below conflicts with the recent decision of this Court in *Agostini* and, simply put, reaches the incorrect result on an important federal question.

B. *Meek* and *Wolman* Do Not Foreclose Application To Chapter 2 Of The Analysis Required By *Agostini*.

The court of appeals did not dispute the foregoing analysis. Rather, it simply refused to apply the *Agostini* test to Chapter 2. It felt constrained to abandon the *Agostini* analysis because it deemed the type of aid provided under the programs here to be virtually identical to that involved in this Court's decisions in *Meek* and *Wolman*. *See* Pet. App. 66a-68a.

Petitioners respectfully submit that *Meek* and *Wolman* did not compel the result reached by the court of appeals, even assuming that the holdings of those cases remain untouched by subsequent decisions. In *Meek* and *Wolman*, the Court considered two different state aid-to-education programs. A reading of those decisions demonstrates that they are distinguishable from this case.

First, when this Court invalidated the programs as applied in *Meek* and *Wolman*, it did *not* treat them as general

educational programs intended to make benefits available on an equal basis to all children regardless of what schools they attend. Rather, in both decisions, the Court focused on the receipt of benefits by students attending religiously affiliated schools. It then invalidated the programs, basing its reasoning on decisions involving aid "targeted" *only* to children attending religiously affiliated schools. *See Meek*, 421 U.S. at 366-67 & n.16 (citing *Public Funds for Public Schools. v. Marburger*, 358 F. Supp. 29 (D. N.J. 1973), *aff'd*, 417 U.S. 961 (1974), which involved a program that, unlike Chapter 2, provided benefits only to a small class of citizens – the parents of children who attended nonpublic schools); *Wolman*, 433 U.S. at 250-51 (citing the analogous holding of *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973), which held unconstitutional a program of targeted benefits directed exclusively at nonpublic school students); *see also Zobrest*, 509 U.S. at 11-12 (characterizing *Meek* as involving a program designed exclusively to channel "'massive aid' to private schools – more than 75% of which were church related"). This case does not involve such "targeted" benefits.[10]

Second, contrary to the view of the court below, many of the particular resources involved in this case are not the same as those invalidated in *Meek* and *Wolman*. For example, this Court has never explicitly ruled on the constitutionality of lending library books of a secular nature

[10] The court of appeals rejected this reason for distinguishing *Meek* and *Wolman* on the ground that the programs at issue in those cases duplicated benefits already available to students in public schools. *See* Pet. App. 69a-70a. But at the time of *Meek* and *Wolman*, operative precedent from this Court rejected the argument that aid to students attending religious schools could be defended as an "endeavor to provide comparable benefits to all parents of schoolchildren whether enrolled in public or nonpublic schools." *Nyquist*, 413 U.S. at 782 n.38.

to religious schools. Common sense would suggest that library books are more similar in nature to textbooks than they are to filmstrip projectors, overhead projectors, phonographs, and other similar equipment involved in *Meek*.[11] The materials involved in *Meek*, for the most part, were means by which religious school teachers arguably could more effectively communicate content chosen by themselves to the students. By contrast, this Court approved the loan of textbooks for the use of parochial school students in *Allen* on the theory that the content of the textbooks could be determined in advance and was not subject to change at the hands of the religious school. *Allen*, 392 U.S. at 244-45; *see also Meek*, 421 U.S. at 359-60; *Wolman*, 433 U.S. at 237-38. The same is true of library books.

The same is also true of computers and computer software. These items enable students to obtain educational content from the wide world outside the walls of the school and are not mere instruments for the more effective communication of the messages selected by the religious school teacher. Allowing parochial school students access to a computer with a modem is like allowing them to check books out of the public library – except that the range of information available is more vast than in any public library and the access is faster. The court of appeals was therefore wrong to treat the current Chapter 2 program as indistinguishable from the programs in *Meek* and *Wolman*.

[11] The empty formalism of the decision below is epitomized by its discussion of the issue of library books. Having concluded that no instructional materials may be provided other than textbooks, and quoting a definition of "textbook" as "a book which a pupil is required to use as a text for a semester or more in a particular class he legally attends," the court concluded that "[w]e do not think library books can be subsumed within that definition." Pet. App. 71a. It does not seem to matter that the reasons underlying this Court's approval of textbook loan programs apply equally, or with greater force, to library books.

This case presents issues never directly addressed by this Court. Accordingly, the court of appeals was not bound to "follow" *Meek* and *Wolman*, and instead should have applied the analysis set forth in *Agostini*.

The court of appeals' conclusion that *Meek* and *Wolman* "directly control" disposition of this case was based on the court's reading of those cases as drawing a strict line between textbooks and other instructional materials. Pet. App. 67a. Yet that was not the direct holding of *Meek* or *Wolman*; it was merely the court of appeals' interpretation of their rationale. In subsequent cases, this Court has repeatedly rejected any such mechanistic line. In *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646, 661-62 (1980), this Court stated that *Meek* and *Wolman* did *not* forbid all loans of secular instructional materials and equipment to students attending religiously affiliated schools. Academic tests (approved in *Wolman* and *Regan*) obviously contribute to the instructional process, as do the remedial educational services upheld in *Agostini*. The Court's stated belief that it was bound to obey this "textbooks vs. other instructional materials dichotomy," Pet. App. 61a, 67a, is therefore wholly unconvincing. The court should have evaluated the facts of Chapter 2 against the principles of constitutional law set forth in this Court's most recent relevant cases. *Meek* and *Wolman* do not stand in the way.

C. An Interpretation of *Meek* And *Wolman* To Preclude The Educational Aid Program At Issue Here Would Produce An Anomalous, Impractical Result Inconsistent With Subsequent Decisions Of This Court.

Were this Court to find that *Meek* and *Wolman* did bar all loans of instructional materials for use of students in nonpublic schools, while keeping intact the permissibility of

comparable textbook loan programs as set forth in *Allen*, the Court should grant the petition to re visit the issue. Legal and factual developments since *Meek* and *Wolman* were decided more than two decades ago have undermined the viability of such a dichotomy.[12] During the more than 20 years since *Meek* and *Wolman*, this Court has:

- *Rejected* the suggestion that *Meek* and *Wolman* mean that "all loans of secular instructional material and equipment inescapably have the effect of direct advancement of religion." *Regan*, 444 U.S. at 661-62 (1980) (citations and internal quotation marks omitted).

- *Rejected* the suggestion that indirect payment, through tax deductions, for some of the very same instructional materials at issue in *Meek* and *Wolman* is barred by the Establishment Clause. *See Mueller v. Allen*, 463 U.S. 388 (1983).

- *Rejected* any presumption in *Meek* and *Wolman* that "[s]ubstantial aid to the educational function of [sectarian] schools . . . necessarily results in aid to the sectarian school enterprise as a whole," *Meek*, 421 U.S. at 366. *See Zobrest*, 509 U.S. at 13-14 (1991) (upholding the provision of on-site services at parochial schools by state employees); *see also Agostini*, 521 U.S. at 228-29.

- *Rejected* the presumption, underlying *Meek* and *Wolman* as interpreted by the Fifth Circuit, that

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[12] *See, e.g., Agostini v. Felton*, 519 U.S. 1086 (1997) (granting the petition in such circumstances); *Andrews v. Louisville & Nashville R.R.* 406 U.S. 320, 322 (1972) (granting the petition because "[l]ater cases from this Court have repudiated the reasoning advanced in support of the result reached" in earlier case).

certain *types* of aid are inherently prone to use for nonsecular purposes regardless of the safeguards employed to ensure their secular use. *See Agostini*, 521 U.S. at 226 (1997) ("there is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee . . . will depart from her assigned duties and instructions and embark on religious indoctrination").

- *Revised* the Establishment Clause test that prevailed at the time of *Meek* and *Wolman* to reflect the fact that the Court's Establishment Clause caselaw "significant[ly] change[d]" since that time. *See Agostini*, 521 U.S. at 237 (citations and internal quotation marks omitted).

In other words, the Court has made clear since *Meek* and *Wolman* -- assuming it did not do so before -- that the Establishment Clause does not bar aid to the educational function of religiously affiliated schools. That would require discrimination against, not neutrality toward, religion. Instead, the Establishment Clause requires that the government be evenhanded in its provision of benefits, neither favoring nor disfavoring religion; that the government itself, and its agents, refrain from engaging in religious indoctrination; and that there be no excessive entanglement, which invades the automony of the religious organizations involved.

Prior to 1971, this Court's decisions involving aid to nonpublic education followed these principles. In *Everson* v. *Board of Education*, 330 U.S. 1 (1947), and *Allen*, this Court upheld neutral programs of assistance to all schoolchildren, under conditions that avoided serious possibility of governmental indoctrination or of excessive entanglement. *See also Walz v. Tax Commissioner*, 397 U.S. 664 (1970) (upholding property tax exemption for charitable

organizations, including churches). After 1979, this Court's decisions have again returned to these principles (other than in *Aguilar v. Felton*, 473 U.S. 402 (1985), *overruled sub nom.* in *Agostini* and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), *overruled in part sub nom.* in *Agostini*). In *Mueller*, *Witters*, *Zobrest*, and *Agostini*, this Court upheld programs of neutral assistance to all students. *See also Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Bowen v. Kendrick*, 487 U.S. 589 (1988). For less than a decade, however, in the 1970s, the Court strayed from these principles, handing down a series of confusing and contradictory decisions that required, in many circumstances, discrimination against students attending religious schools. *Meek* and *Wolman* belong to that period. If they cannot be distinguished, they should be overruled.

This case thus involves an important federal statute that has been in place in different forms for more than three decades. The issue has produced a direct conflict between the Fifth and Ninth Circuits. The court below refused to apply the analysis prescribed by this Court's most recent relevant precedent. All of these are compelling reasons for granting the petition for certiorari. More generally, the lower courts have expressed the need for further guidance regarding what the court below called "the vast, perplexing desert of Establishment Clause jurisprudence." Pet. App. 13a. When lower courts candidly admit that they are confused about the law, it is time for this Court to speak. Most importantly of all, this case involves the vital interests of American schoolchildren in obtaining access to modern technological equipment and materials. The Court should grant the petition for certiorari to resolve these significant constitutional questions, and to confirm that nothing in the Establishment Clause prevents children who attend religiously affiliated schools from participating in Chapter 2 on an equal basis with all other schoolchildren.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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April 13, 1999

APPENDIX

TABLE OF CONTENTS OF APPENDIX

Page

Opinion Entered in Connection with Judgment Sought to be Reviewed.....1a

Helms v. Picard, 151 F.3d 347 (5th Cir. 1998).....1a

Other Relevant Opinions and Orders.....79a

Helms v. Cody, 1997 WL 35283 (E.D. La. Jan. 28, 1997).....79a

Helms v. Arveson, 1994 WL 406406 (E.D. La. Jul. 25, 1994).....119a

Helms v. Cody, 1990 WL 36124 (E.D. La. Mar. 27, 1990).....137a

Order on Rehearing.....152a

Helms v. Picard, 165 F.3d 311 (5th Cir. 1999).....152a

Constitutional Provisions, Statutes, and Regulations Involved in Case.....156a

Establishment Clause.....156a

20 U.S.C. § 7301, *et seq.*.....157a

34 C.F.R. § 299.1, *et seq.*.....178a

OPINION ENTERED IN CONNECTION WITH JUDGMENT SOUGHT TO BE REVIEWED

151 F.3d 347
128 Ed. Law Rep. 593
(Cite as: 151 F.3d 347)

Mary L. HELMS, individually and as next friend of Amy T. Helms; Amy T. Helms, a minor; Marie L. Schneider, Plaintiffs-Appellants-Cross Appellees-Appellees,

v.

Cecil J. PICARD, Louisiana Superintendent of Public Education; Kenneth Duncan, Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education; Jefferson Parish School Board System; Elton Lagasse, Superintendent of the Jefferson Parish School System; Laurie E. Rolling, President and member of the Jefferson Parish School Board; Libby Moran, Vice President and member of the Jefferson Parish School Board; Robert Wolfe, member of the Jefferson Parish School Board; Barry Bordelon, member of the Jefferson Parish School Board; O.H. Guidry, member of the Jefferson Parish School Board; Cedric Floyd, member of the Jefferson Parish School Board; Polly Thomas, member of the Jefferson Parish School Board; Gene Katsanis, member of the Jefferson Parish School Board; Martin Marino, member of the

Jefferson Parish School Board,
Defendants-Appellees-Cross Appellants,

and

Richard W. Riley, Secretary of the United States Department of Education;
United States Department of Education,
Defendants-Appellees,

and

Special Education Services Corporation,
Defendant-Appellant,

and

Guy Mitchell; Jan Mitchell; Eugene Cerise; Kathy Cerise, Intervenor
Defendants-Appellees-Cross Appellants.

No. 97-30231.

United States Court of Appeals,
Fifth Circuit.

Aug. 17, 1998.

Action was brought challenging constitutionality under the First Amendment of three Louisiana and one federal school aid programs as applied to parochial schools in Jefferson Parish, Louisiana. The United States District Court for the Eastern District of Louisiana, Frederick J.R. Heebe, J., 856 F.Supp. 1102, held that special education program, as applied, violated Establishment Clause, but that parish transportation program did not. The District Court, Marcel

Livaudais, J., upheld Chapter 2 program. On appeal, the Court of Appeals, Duhe, Circuit Judge, held that: (1) the Supreme Court has not abandoned, nor even fundamentally changed, the Lemon test used to evaluate whether government aid violates the Establishment Clause; (2) Louisiana's program of special education and related services for exceptional children, provided in part by full-time public school teachers in classrooms in parochial schools, as applied in Jefferson Parish, does not violate the Establishment Clause; (3) Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965, and its Louisiana counterpart, are unconstitutional under the Establishment Clause as applied in Jefferson Parish; and (4) agreement between school board and private, nonprofit corporation, whose "members" were parents of children attending six parochial schools, to provide funds for the transportation of nonpublic school children to and from those school did not violate the Establishment Clause.

Reversed and rendered in part and affirmed in part.

[1] CONSTITUTIONAL LAW 84.5(4.1)
92k84.5(4.1)
Government aid that directly aids the educational function of religious schools is valid if it meets the following requirements: (1) aid is neutral, that is, it is made available generally without regard to the sectarian-nonsectarian, public-nonpublic nature of the institution benefited; (2) any money that ultimately goes to religious institutions does so only as a result of the genuinely independent and private choices of individuals; and (3) the aid cannot indirectly finance religious education by relieving the sectarian school of costs it otherwise would have borne in educating its students. U.S.C.A. Const.Amend. 1.

[2] CONSTITUTIONAL LAW 84.5(4.1)
92k84.5(4.1)
When assessing whether a government aid program that benefits the educational function of religious schools has the impermissible effect of advancing religion, the criteria by which that aid is allocated are relevant in two distinct ways: whether any use of the aid to indoctrinate religion can be attributed to the state, and, whether the criteria themselves create a financial incentive to undertake religious indoctrination. U.S.C.A. Const.Amend. 1.

[3] CONSTITUTIONAL LAW 84.1
92k84.1
Factors used to assess whether an entanglement of government with religion is excessive, which are similar to those used to examine effect of government aid, include (1) the character and purposes of the institutions benefited, (2) the nature of the aid that the State provides, and (3) the resulting relationship between the government and religious authority. U.S.C.A. Const.Amend. 1.

[4] SCHOOLS 7
345k7
Evidence demonstrating the insufficiency of a particular monitoring system is required before court will conclude that public teachers on parochial school grounds are impermissibly inculcating religion. U.S.C.A. Const.Amend. 1.

[5] CONSTITUTIONAL LAW 84.1
92k84.1
Supreme Court has not abandoned, nor even fundamentally changed, the Lemon test used to evaluate whether government aid violates the Establishment Clause; the first prong of Lemon, which asks whether a statute has a secular legislative purpose, remains unchanged, but the Court has

somewhat altered its understanding of the criteria used to assess whether aid to religion has an impermissible effect, by abandoning three of the assumptions which underlay that prong, and has expressly recognized that the "entanglement" prong of Lemon is more properly addressed as an aspect of the "effects" prong. U.S.C.A. Const.Amend. 1.

[6] CONSTITUTIONAL LAW 84.1
92k84.1
Test used to evaluate whether government aid violates the Establishment Clause has two prongs: the first prong asks whether a statute has a secular legislative purpose, and the second asks whether the aid has the effect of advancing religion, under the three criteria of whether the aid results in governmental indoctrination, whether the aid defines its recipients by reference to religion, and whether the aid creates an excessive entanglement. U.S.C.A. Const.Amend. 1.

[7] CONSTITUTIONAL LAW 84.5(4.1)
92k84.5(4.1)
For purposes of determining whether there is violation of the Establishment Clause by Louisiana's program of special education and related services for exceptional children, provided in part by public school teachers in classrooms in parochial schools, equitable provision of such services is a secular legislative purpose. U.S.C.A. Const.Amend. 1; LSA-R.S. 17:1941, 17:1942.

[7] SCHOOLS 7
345k7
For purposes of determining whether there is violation of the Establishment Clause by Louisiana's program of special education and related services for exceptional children, provided in part by public school teachers in classrooms in parochial schools, equitable provision of such services is a

secular legislative purpose U.S.C.A. Const.Amend. 1; LSA-R.S. 17:1941, 17:1942.

[8] CONSTITUTIONAL LAW 84.1
92k84.1
Government may not participate in the indoctrination of religion. U.S.C.A. Const.Amend. 1.

[9] CONSTITUTIONAL LAW 84.5(4.1)
92k84.5(4.1)
Mere presence of a publicly paid teacher on sectarian school premises does not give rise to the presumption that those teachers will inculcate religion in their students. U.S.C.A. Const.Amend. 1.

[10] CONSTITUTIONAL LAW 84.5(4.1)
92k84.5(4.1)
Louisiana's program of special education and related services for exceptional children, provided in part by full-time public school teachers in classrooms in parochial schools, as applied in Jefferson Parish, does not result in government indoctrination of religion, in violation of the Establishment Clause; there is no evidence that any special education teachers have ever attempted to indoctrinate their students, while there was some monitoring of the teachers by parochial school principals and there were administrative ties of teachers to the parochial schools, state had not abdicated its review of the substance of the special education instruction, and only the state has the legal duty to provide an appropriate, free, publicly supported education to every exceptional child. U.S.C.A. Const.Amend. 1; LSA-R.S. 17:1941, 17:1943(2, 4), 17:1944(A)(1).

[10] SCHOOLS 7
345k7
Louisiana's program of special education and related services

for exceptional children, provided in part by full-time public school teachers in classrooms in parochial schools, as applied in Jefferson Parish, does not result in government indoctrination of religion, in violation of the Establishment Clause; there is no evidence that any special education teachers have ever attempted to indoctrinate their students, while there was some monitoring of the teachers by parochial school principals and there were administrative ties of teachers to the parochial schools, state had not abdicated its review of the substance of the special education instruction, and only the state has the legal duty to provide an appropriate, free, publicly supported education to every exceptional child. U.S.C.A. Const.Amend. 1; LSA-R.S. 17:1941, 17:1943(2, 4), 17:1944(A)(1).

[11] CONSTITUTIONAL LAW 84.5(5)
92k84.5(5)
Tuition and the surcharge paid by parents of parochial school students to supplement salaries of publicly-employed special education teachers working at those schools, to equalize the salaries of special education teachers working in nonpublic schools to those of special education teachers working in public schools, could not be regarded as direct economic benefit to those schools, in violation of Establishment Clause, absent showing that school makes a profit on each student, that without the special education program the child would have gone to school elsewhere, and that the school then would have been unable to fill that child's spot. U.S.C.A. Const.Amend. 1.

[11] SCHOOLS 7
345k7
Tuition and the surcharge paid by parents of parochial school students to supplement salaries of publicly-employed special education teachers working at those schools, to equalize the salaries of special education teachers working in nonpublic

schools to those of special education teachers working in public schools, could not be regarded as direct economic benefit to those schools, in violation of Establishment Clause, absent showing that school makes a profit on each student, that without the special education program the child would have gone to school elsewhere, and that the school then would have been unable to fill that child's spot. U.S.C.A. Const.Amend. 1.

[12] CONSTITUTIONAL LAW 84.5(4.1)
92k84.5(4.1)
Louisiana's program of special education and related services for exceptional children, provided in part by full-time public school teachers in classrooms in parochial schools, as applied in Jefferson Parish, does not select its beneficiaries so as create a financial incentive to undertake religious indoctrination, in violation of the Establishment Clause; program selects its aid beneficiaries based on neutral, secular criteria of the exceptionality of the child and the number of exceptional students enrolled in parish and in its individual school districts. U.S.C.A. Const.Amend. 1; LSA-R.S. 17:1941- 17:1956.

[12] SCHOOLS 7
345k7
Louisiana's program of special education and related services for exceptional children, provided in part by full-time public school teachers in classrooms in parochial schools, as applied in Jefferson Parish, does not select its beneficiaries so as create a financial incentive to undertake religious indoctrination, in violation of the Establishment Clause; program selects its aid beneficiaries based on neutral, secular criteria of the exceptionality of the child and the number of exceptional students enrolled in parish and in its individual school districts. U.S.C.A. Const.Amend. 1; LSA-R.S. 17:1941- 17:1956.

[13] CONSTITUTIONAL LAW 84.5(4.1)
92k84.5(4.1)
Louisiana's program of special education and related services for exceptional children, provided in part by full-time public school teachers in classrooms in parochial schools, as applied in Jefferson Parish, does not create or necessitate excessive entanglement, in violation of the Establishment Clause; there was no showing that monitoring system involving occasional visits by employees of public school board system was insufficient to prevent or to detect inculcation of religion. U.S.C.A. Const.Amend. 1; LSA-R.S. 17:1941-17:1956.

[13] SCHOOLS 7
345k7
Louisiana's program of special education and related services for exceptional children, provided in part by full-time public school teachers in classrooms in parochial schools, as applied in Jefferson Parish, does not create or necessitate excessive entanglement, in violation of the Establishment Clause; there was no showing that monitoring system involving occasional visits by employees of public school board system was insufficient to prevent or to detect inculcation of religion. U.S.C.A. Const.Amend. 1; LSA-R.S. 17:1941-17:1956.

[14] CONSTITUTIONAL LAW 84.5(4.1)
92k84.5(4.1)
Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965, and its Louisiana counterpart, are unconstitutional under the Establishment Clause as applied in Jefferson Parish, Louisiana, to the extent that either program permits the loaning of educational or instructional equipment to sectarian schools; invalidity encompasses such items as filmstrip projectors, overhead projectors, television

sets, motion picture projectors, video cassette recorders, video camcorders, computers, printers, phonographs, and slide projectors, as well as the furnishing of library books by the State, even from prescreened lists. U.S.C.A. Const.Amend. 1; Elementary and Secondary Education of 1965, §§ 6102, 6301(b)(2), 6401(b), 6402(a)(1), (c)(1), as amended, 20 U.S.C.A. §§ 7312, 7351(b)(2), 7371(b), 7372(a)(1), (c)(1); LSA-R.S. 17:351, 17:352.

[14] CONSTITUTIONAL LAW 84.5(5)
92k84.5(5)
Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965, and its Louisiana counterpart, are unconstitutional under the Establishment Clause as applied in Jefferson Parish, Louisiana, to the extent that either program permits the loaning of educational or instructional equipment to sectarian schools; invalidity encompasses such items as filmstrip projectors, overhead projectors, television sets, motion picture projectors, video cassette recorders, video camcorders, computers, printers, phonographs, and slide projectors, as well as the furnishing of library books by the State, even from prescreened lists. U.S.C.A. Const.Amend. 1; Elementary and Secondary Education of 1965, §§ 6102, 6301(b)(2), 6401(b), 6402(a)(1), (c)(1), as amended, 20 U.S.C.A. §§ 7312, 7351(b)(2), 7371(b), 7372(a)(1), (c)(1); LSA-R.S. 17:351, 17:352.

[14] SCHOOLS 3
345k3
Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965, and its Louisiana counterpart, are unconstitutional under the Establishment Clause as applied in Jefferson Parish, Louisiana, to the extent that either program permits the loaning of educational or instructional equipment to sectarian schools; invalidity encompasses such items as filmstrip projectors, overhead projectors, television

sets, motion picture projectors, video cassette recorders, video camcorders, computers, printers, phonographs, and slide projectors, as well as the furnishing of library books by the State, even from prescreened lists. U.S.C.A. Const.Amend. 1; Elementary and Secondary Education of 1965, §§ 6102, 6301(b)(2), 6401(b), 6402(a)(1), (c)(1), as amended, 20 U.S.C.A. §§ 7312, 7351(b)(2), 7371(b), 7372(a)(1), (c)(1); LSA-R.S. 17:351, 17:352.

[15] CONSTITUTIONAL LAW 84.5(5)
92k84.5(5)
Library books are not "textbooks" within principle that state may, without violating Establishment Clause, lend free textbooks to parochial schools. U.S.C.A. Const.Amend. 1.
See publication Words and Phrases for other judicial constructions and definitions.

[16] CONSTITUTIONAL LAW 84.5(5)
92k84.5(5)
Agreement between school board and private, non-profit corporation, whose "members" were parents of children attending six parochial schools, to provide funds for the transportation of nonpublic school children to and from those schools did not violate the Establishment Clause, where allocation of funds to the corporation was simply one part of a broader, general program by which the State and parish provided a secular, noninstructional service to sectarian and nonsectarian schoolchildren alike, and the corporation focused on the six schools at issue because they had been excluded from local funding due to cuts in transportation funds from the state. U.S.C.A.. Const.Amend. 1; LSA-R.S. 17:158.

[16] SCHOOLS 159.5(2)
345k159.5(2)
Agreement between school board and private, non-profit

corporation, whose "members" were parents of children attending six parochial schools, to provide funds for the transportation of nonpublic school children to and from those schools did not violate the Establishment Clause, where allocation of funds to the corporation was simply one part of a broader, general program by which the State and parish provided a secular, noninstructional service to sectarian and nonsectarian schoolchildren alike, and the corporation focused on the six schools at issue because they had been excluded from local funding due to cuts in transportation funds from the state. U.S.C.A.. Const.Amend. 1;; LSA-R.S. 17:158.

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Appeals from the United States District Court for the Eastern District of Louisiana.

Before DUHE, BENAVIDES and STEWART, Circuit Judges.

DUHE, Circuit Judge:

I.

This case requires us to find our way in the vast, perplexing desert of Establishment Clause jurisprudence. Plaintiffs, as taxpayers, sued Defendant Jefferson Parish School Board et al., claiming that three state and one federal school aid programs were unconstitutional as applied in Jefferson Parish, Louisiana. [FN1] The District Court initially granted Plaintiffs' motion for summary judgment on some issues. The court then conducted a bench trial on the remaining issues and rendered judgment. When the case was reassigned due to the district judge's retirement, the new judge reversed some of the court's earlier rulings. All told, the parties spent some thirteen years in district court before

reaching this Court. During that time the sand dunes have shifted.

> FN1. The challenged aid programs and the procedural history of the case are more fully developed infra.

II.

Plaintiffs first ehallenge Louisiana's special education program, codified at La.Rev.Stat.Ann. § 17:1941-1956 (West 1982 & West Supp.1998), as administered in Jefferson Parish, under the Establishment Clause. After a bench trial, the district court ruled that the special education program was unconstitutional as applied, because it had the impermissible effect of advancing religion and because the monitoring necessary to prevent such an effect would result in excessive entanglement between church and state. See Helms v. Cody, 856 F.Supp. 1102, 1121 (E.D.La.1994) ("Helms").

A.

"It is and shall be the duty of state, city and parish public school systems of the state of Louisiana to provide an appropriate, free, publicly supported education to every exceptional child who is a resident therein." La.Rev.Stat.Ann. § 17:1941 ("special education statute"). [FN2] Louisiana law defines "special education" ***351** as "any program of instruction within the preschool, elementary, and secondary school structures of the state, specifically designed to provide for different learning styles of exceptional children." La.Rev.Stat.Ann. § 17:1943(4)(West Supp.1998). Special education programs are administered by the State Department of Education ("the Department") at the state level, and by parish or city school

boards at the parish or city levels; at those lower levels, the Department provides "only general supervision and monitoring." La.Rev.Stat.Ann. § 17:1944(A)(1) (West Supp.1998). [FN3]

> FN2. An "exceptional child" is one who is mentally disabled, gifted and talented, hard of hearing, deaf, speech impaired, severe language disordered, visually impaired, emotionally disturbed, orthopedically impaired, hospital/homebound, other health impaired, learning disabled, which includes attention deficit disordered and dyslexia, traumatic brain injured, or autistic, and as a result may require special education or services.
>
> La.Rev.Stat.Ann. § 17:1943(2)(West Supp.1998). We will note any provisions of the special education statute that have been amended since the time of trial and whether those amendments have any bearing on the questions before us.
>
> FN3. Additionally, the office of special education services within the Department provides "general supervision and monitoring of all education programs for exceptional children conducted within the state." La.Rev.Stat.Ann. § 17:1944(A)(2) (West Supp.1998).

The district court found that state funds for special education programs are allocated to the Jefferson Parish Public School System ("JPPSS") "based on the number of exceptional children served by employees of the local school board, consistent with state-required pupil/teacher ratios for the provision of services to students with particular exceptionalities." Helms, 856 F.Supp. at 1110. The court also found that "[t]he public school system receives federal

monies based on the 'child count' of special education students enrolled at both public and nonpublic schools." Id.

The Department or city/parish school boards are authorized to "enter into a purchase of services agreement with any other public or nonpublic school, agency or institution to provide free appropriate education to exceptional children in need of special education and related services...." La.Rev.Stat.Ann. § 17:1949-50 (West 1982). Pursuant to that authority, the Jefferson Parish School Board ("JPSB") contracted with the Special Education Services Corporation ("SESC") to provide special education services by public school teachers at private schools operated under the authority of the Archdiocese of New Orleans. [FN4] The district court found that at the time of trial the sole employee of SESC (its executive director Jan Janz) was also a paid employee of the Office of Special Education for the Archdiocese of New Orleans; additionally, the members of the SESC were

> FN4. SESC was established as a Louisiana nonprofit corporation in 1981. It was organized for the purpose of "assist[ing] students who are having academic and behavior problems to cope in the school environment." Although SESC was originally funded with $1.65 million by the 1982 Legislature, the District Court found that since at least 1987, SESC has not received any funds from the State of Louisiana or any other governmental body. See Helms, 856 F.Supp. at 1108.

> [t]he respective Presidents of the Archdiocesan School Board and Diocesan School Board of the Roman Catholic Archdiocese of New Orleans, and the Roman Catholic Diocese of Lafayette, Baton Rouge, Houma-Thibodeaux, and Lake Charles, and a representative to be appointed by the Bishop of the Diocese of Alexandria-Shreveport, respectively.

Helms, 856 F.Supp. at 1108. The court thus concluded that SESC was a "religiously-affiliated corporation." Id.

The availability of special education services on the premises of nonpublic schools in Jefferson Parish caused a "dramatic escalation of requests for special-education teachers and aides by the approved nonpublic schools...." Helms, 856 F.Supp. at 1108. Wary that such a trend might funnel off too many students and teachers to private schools, in 1982 the JPSB formed a committee comprised of its staff and staff from the Archdiocese of New Orleans to study the problem. The committee issued a report recommending, inter alia, (1) that state funding for teachers and aides working in nonpublic schools be capped at its 1982-83 levels (excluding teachers covered under the contractual agreement for 1982-83 with SESC); (2) that, beginning with the 1983-84 academic year, "the total local costs for any new positions or vacancies for teachers or teacher ***352** aides will be borne by the Catholic schools to which these persons are assigned"; and (3) that the Archdiocese would be able to establish new special education classes at its schools, but that "the total local costs ... [would] be the responsibility of the individual schools." Id. at 1109. The JPSB approved the report.

The JPSB/SESC contract for the 1989-90 school year provided that the JPSB would hire up to 14 special education teachers and up to 5 teacher assistants. These teachers and assistants were assigned to Chinchuba Institute for the Deaf and eight parochial schools. [FN5] Under the contract, the classrooms were to be provided by SESC at no cost to the JPSB. The special education programs conducted in those classrooms would be supervised by both the JPSB and the administrator of SESC.

FN5. The eight parochial schools were Immaculate Conception High School, Archbishop Rummel High School, St. Agnes Elementary School, St. Angela Elementary School, St. Benilde Elementary School, St. Christopher Elementary School, St. Francis Xavier Elementary School, and St. Mary Magdalen Elementary School.

Pursuant to the contract, SESC billed the JPSB for the cost of the special education teachers and teacher assistants provided to the nine nonpublic schools. For the fiscal year 1989-90, that cost was estimated to be approximately $149,583.00. The salary of a special education teacher, one facet of those costs, consists of (1) money from the "minimum foundation" program (i.e., money that comes to Jefferson Parish from the State); and (2) the local salary supplement. In the public schools, the JPSB pays the local salary supplement. By contrast, in the nonpublic schools the SESC agreed to pay the supplement. Since 1987, SESC has been funded by contributions from the participating nonpublic schools. The parents of special education students attending these nonpublic schools pay a supplemental fee to SESC, in addition to tuition they would normally pay. See Helms, 856 F.Supp. at 1117.

Jefferson Parish special education teachers in both public and nonpublic schools are subject to the same Collective Bargaining Agreement. A clause in the 1989-90 agreement states that "[p]ositions in special education classes which are provided in nonpublic schools and are a duplication of services provided by the Jefferson Parish Public School System shall be filled only after all special education positions in the Jefferson Parish Public School System have been filled by certified special education teachers." See Helms, 856 F.Supp. at 1110 (emphasis added). Notably,

however, an exception to that clause states that "[t]he Board shall not involuntarily transfer special education teachers assigned to nonpublic schools prior to the 1983-84 school session unless pupil-teacher ratio changes reduce teacher needs." Id. at 1110-11. The district court found that this exception functions as a "compromise agreement involving public school teachers providing special education services at nonpublic schools." Id. at 1111 (internal quotes omitted). Twelve of the fourteen special education teachers currently employed by the Jefferson Parish Public School System and providing services at nonpublic schools are there by reason of the exception in the Collective Bargaining Agreement ("the grandfather provision"). Id.

Pursuant to State regulations, the JPSB and SESC entered into an "interagency agreement," to be effective for one year from July 1, 1989, the stated purpose of which was to "formalize the cooperation and to identify the responsibilities" of the two entities regarding the special education program. See Helms, 856 F.Supp. at 1113. The interagency agreement does not specifically provide for monitoring to determine whether the special education teacher engages in either religious discussion or conduct. The contract only provides that the principal of the nonpublic school "will ensure that the policies and procedures of the [JPSB] will be followed in all areas of cooperative effort." Id. [FN6] The State, however, conducts inspections of *353 randomly selected special education programs once every three years; these inspections include a thorough review of students' school records and interviews with teachers and principals. Id. at 1114.

FN6. Nonpublic school principals are also contractually bound to "enforce, apply, and follow all [JPSB] personnel policies and procedures, including but not limited to the Collective Bargaining

> Agreement, the Teacher Evaluation Program, and the Teacher Assistant Evaluation Program, in the 'management and supervision of the teachers' employed by the JPPSS." Helms, 856 F.Supp. at 1114.

The teaching responsibilities of each JPPSS special education teacher are described in the Individualized Education Program ("IEP") of each of the teacher's students. An IEP describes each child's entire special education curriculum. State regulations mandate that "[t]he responsibility for the development of each initial IEP rests with the [public] school system's special education supervisor." Helms, 856 F.Supp. at 1114. Religious instruction is not described in the IEP, nor do church or religious officials have any authority whatsoever over the content of the IEP. Id. Moreover, special education teachers must and do teach only what is outlined in the IEP. Id.

The District Court specifically found that: "[t]he JPPSS special education teachers at nonpublic schools do not teach religion" Id.; "[t]he special education classrooms are used only for special education instruction" Id.; and that "JPPSS special education teachers at the eight Catholic schools are not required to attend any religious services.' Id.

Special education teachers teach in self-contained or resource classrooms within each Catholic school's facility. JPPSS requires all special education classrooms to be "located in the center of the school" to make it easier for students to get to their classroom. To that end, most classrooms are located in the main school building or on the main school campus. [FN7] No sign or other special designation indicates that the special education classroom or area used is a public school classroom or area. See Helms, 856 F.Supp. at 1115.

> FN7. The one noted exception is at St. Christopher's Elementary School, where the special education classroom is located in a portable unit.

Nonpublic school principals may assign JPPSS special education teachers non- teaching custodial duties involving oversight of student safety and behavior-- such as lunch duty or bus duty--only in a manner consistent with the Collective Bargaining Agreement. Pursuant to that agreement, the special education teachers may also be required to attend faculty meetings no more frequently than once per month, for one hour. See id. at 1114.

The JPSB/SESC contract states that "[t]eacher evaluation in the nonpublic schools falls under the auspices of the [JPPSS]; therefore, the nonpublic schools must follow all policies and procedures of the [JPPSS] governing teacher evaluation." The contract also stipulates that in the nonpublic schools, principals and special education teachers shall participate in evaluation and special education policies and procedures. See id. at 1115. The principal of the nonpublic school is the "supervisor and 'formal evaluator' of the special education teachers in that school." See id. at 1117. The record indicates that the principal, through actual classroom observation of the special education teachers and through interviews, performs limited evaluations of the teachers' "teaching abilities" and "classroom management skills." The record also indicates the principal's supervisory role is strictly circumscribed by JPPSS. There is no evidence demonstrating that the principals have supervisory authority over the content of the special education program.

The District Court made the following findings regarding Mary L. Cerise, a JPPSS special education teacher at St. Angela Merici. Prior to her employment as a special

education teacher by JPPSS, Cerise was employed by St. Angela Merici for approximately ten years as an elementary education teacher. Now, however, she informs her students that she is a JPPSS employee; parents become aware of her employment when they sign the child's IEP. In testifying about her contacts with the principal at St. Angela Merici, Cerise indicated that "during the day he often walks in and out of the classrooms." Cerise also testified that the principal was her immediate supervisor in that "[h]is position is to see that [she] implement[s] the program as outlined on the [IEP] and that [she is] carrying out the instructional objectives and trying to meet the needs of each ***354** child that is in [her] care." See Helms, 856 F.Supp. at 1116.

Prior to Cerise's tenure, an employee of JPPSS would regularly monitor Cerise's files and classroom activities at the school. Since her tenure, however, no state employee has monitored her classroom; instead, she writes down everything she does in the IEP, which is sent to an "IEP specialist" and then returned to her with accompanying commentary. The IEP specialist, Barbara Cavallino, a JPPSS employee, did not visit St. Angela Merici during the 1989-90 school year, but did visit once during the previous year. Cerise's contact with the IEP specialist is normally by telephone and occurs whenever she has an "academically or IEP-related" question that she wants clarified. See id.

In addition to the student report cards issued by the parochial school, Cerise must complete a progress report which is required by the JPPSS for every special education student. Cerise attends faculty meetings at St. Angela Merici on a monthly basis. She attended one general workshop for all special education teachers sponsored by the JPPSS at the beginning of the 1989-90 school year. See id.

Jan Janz, the sole employee and executive director of SESC, has "general supervision" of the special education program provided on nonpublic school premises by the JPSB/SESC contract. She visits the special education classrooms and monitors the evaluations and the IEPs of the special education students that are on file. Janz testified that she did not specifically monitor for religious symbols in the special education classrooms, but that if she observed a religious symbol in the classrooms, she "would ask that they remove it." Barbara Turner Windhorst, the director of special education from June of 1982 to January of 1987, was not aware of any JPPSS policy which required the director of special education to observe whether religious symbols were present in the special education classrooms. She did not investigate for the presence of religious symbols, nor did she recall whether any religious symbols were present in the special education classrooms. The State of Louisiana has no policy that requires its employees to inspect the special education classrooms for such symbols. See id. at 1117.

JacLynn Welsch, a volunteer teacher's assistant to Jean Douglass (a JPPSS special education teacher also at St. Angela Merici), testified that Douglass taught special education classes to upper grades in a partially partitioned classroom. The classroom also serves as the special education room for another teacher. Welsch testified that there is a crucifix in the room. See id. at 1116.

The district court ended its fact-findings with the following conclusions:

> (1) "[S]pecial education teachers employed by the [JPSB] provide special education services on the premises of parochial schools";

(2) "[T]here was no financial incentive for the parents of special education students to choose a nonpublic school. In fact it is undisputed that the students would have received special education at no cost in the public schools. Instead, the parents of special education students elected to pay an extra charge, in addition to the regular tuition, in order for their children to attend a parochial school";

(3) "The State of Louisiana is presently disbursing funds to Jefferson Parish to provide special education services to all qualified children in Jefferson Parish, whether they attend public or nonpublic schools";

(4) "[N]o state, federal, or Jefferson Parish funds are paid directly to SESC or to the parochial schools. Rather, SESC contributes monies to the [JPSB] to help pay for the salaries of the JPPSS special education teachers located at the parochial schools. SESC receives its monies from the individual schools providing the special education services";

(5) "[T]he parochial schools have received a direct economic benefit by furnishing special education services on their premises. The parochial schools receive tuition and a special education surcharge from the special education students, yet they are not responsible ***355** for the full salaries of the JPPSS special education teachers. The JPPSS special education teachers are paid by the [JPSB] with funds primarily obtained from the State of Louisiana and supplemented by the parochial schools through SESC";

(6) "[I]f the special education services were not provided at the nonpublic schools, those special

education students would be compelled to attend public schools which provide the necessary services at no charge to the parents. Thus, the nonpublic schools would be deprived of an economic benefit, that is, the tuition and the special education surcharge received from the special education students."

Helms, 856 F.Supp. at 1117-18.

B.

The district court began its conclusions of law by holding that the eight Catholic schools at issue here are "pervasively sectarian." Helms, 856 F.Supp. at 1118, quoting Bowen v. Kendrick, 487 U.S. 589, 610, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988). Regarding the familiar three-part test of Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), the court observed that "even though Lemon has not been overruled, its continuing vitality appears to be in question." Helms, 856 F.Supp. at 1118, citing Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 113 S.Ct. 2141, 2148 n. 7, 124 L.Ed.2d 352 (1993).

Thus, the court relied primarily on the analysis used in the Supreme Court's (then) most-recent Establishment Clause case, Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993). Zobrest held that the Establishment Clause does not bar a school district from furnishing an exceptional child with a sign-language interpreter at a parochial school "in order to facilitate his education." Zobrest, 509 U.S. at 14, 113 S.Ct. 2462. The district court followed the Zobrest analysis and asked whether the Louisiana special education program, as applied in Jefferson Parish, more closely resembled the school aid programs found constitutional in Mueller v. Allen, 463 U.S.

388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983), and Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986), or instead more closely resembled the school aid programs struck down in Meek v. Pittenger, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975), and School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985). See Helms, 856 F.Supp. at 1118- 19, citing Zobrest, 509 U.S. at 7-14, 113 S.Ct. 2462.

Ultimately, the court found that "the situation in the instant case more closely resembles Meek and Ball, rather than Mueller and Witters." Helms, 856 F.Supp. at 1120-21. In the court's view, the provision of special education services on parochial school premises, where the teachers are paid by a combination of State and SESC funds, amounted to "assistance ... given directly to the schools themselves, and not indirectly through the parents or students." Id. (Quoting from Meek, the court thus concluded that the JPPSS special education teachers were "performing educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." Id. at 1121, quoting Meek, 421 U.S. at 371, 95 S.Ct. 1753. Further, the court found that the continuing surveillance necessary to insure that teachers would not inculcate religion "could result in administrative entanglement between the parochial schools and the State and Jefferson Parish." Helms, 856 F.Supp. at 1121, citing Meek, 421 U.S. at 372, 95 S.Ct. 1753. Consequently, the court felt itself "compelled to find that the special education statute, La.Rev.Stat.Ann. §§ 17:1941-1956, which allows state-paid teachers to teach on the premises of pervasively sectarian institutions, violates the Establishment Clause as applied." Helms, 856 F.Supp. at 1121.

C.

1.

When we view the deceptively simple *356 words of the Establishment Clause [FN8] through the prism of the Supreme Court cases interpreting them, the view is not crystal clear. Indeed, when the Supreme Court itself admits that it "can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law," as a Circuit Court bound by the High Court's commandments we must proceed in fear and trembling. See Lemon, 403 U.S. at 612, 91 S.Ct. 2105, quoted with approval in Mueller, 463 U.S. at 393, 103 S.Ct. 3062, and Committee for Public Education v. Nyquist, 413 U.S. 756, 761, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973).

> FN8. "Congress shall make no law respecting an establishment of religion...." U.S. Const. amend. I.

That said, we begin by observing that the Supreme Court's most recent sermon in this area, Agostini v. Felton, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997), which was not available to the district court, must control the outcome here, as it presents a factual situation closely analogous to our own. See discussion infra. Agostini overruled a portion of Ball, supra, a case on which the District Court relied. See Agostini, at ----, 117 S.Ct. at 2016, overruling Aguilar v. Felton, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985), and overruling in part School District of City of Grand Rapids v. Ball, 473 U.S. 373, 105 S.Ct. 3248, 87 L.Ed.2d 267 (1985). The crucial question before us is whether Agostini mandates a different result than that reached by the district court. We hold that it does.

Agostini considered the constitutionality of Title I of the Elementary and Secondary Education Act of 1965, 79 Stat.

27, as modified, 20 U.S.C. § 6301 et seq. ("Title I"). Title I channels federal funds, through the States, to "Local Educational Agencies" ("LEAs"), which in turn spend the funds to provide remedial education, guidance and job counseling to eligible students. See Agostini, at ----, 117 S.Ct at 2003. An eligible student is one who resides within the attendance boundaries of a school located in a low-income area and who is failing, or is at risk of failing, the State's student performance standards. Id. at ---- - ----, 117 S.Ct. at 2003-04. Title I requires that funds be made available equitably to all eligible children, whether they attend public or private schools. Id. at ----, 117 S.Ct. at 2004.

When an LEA provides Title I services to children attending private schools, those services are subject to heightened constraints. For example, Title I services may be provided only to eligible private school students and, unlike at public schools, those services therefore cannot be provided on a "school- wide" basis. See id. Additionally, the LEA must retain complete control over Title I funds and must retain title to all materials used in conjunction with Title I services. Id. The LEA also must provide those services through public employees or other persons independent of the private school and any religious institution. Id. Importantly, the Title I services themselves must be "secular, neutral, and nonideological," and must "supplement, and in no case supplant, the level of services" already provided by the private school. Id.

The LEA in Agostini, the Board of Education of the City of New York, struggled for over a decade attempting to provide Title I services to private school students within its jurisdiction. See Agostini, at ----, 117 S.Ct. at 2004. After unsuccessful experiments involving the off-campus

provision of services, the Board of Education implemented the plan that invoked the wrath of the Agostini plaintiffs:

> That plan called for the provision of Title I services on private school premises during school hours. Under the plan, only public employees could serve as Title I instructors and counselors. Assignments to private schools were made on a voluntary basis and without regard to the religious affiliation of the employee or the wishes of the private school. [A] large majority of Title I teachers worked in nonpublic schools with religious affiliations different from their own. The vast majority of Title I teachers also moved among the private schools, spending fewer than five days a week at the same school.

*357 Agostini, at ----, 117 S.Ct. at 2004 (citations omitted). As an additional safeguard, public employees providing Title I services on private school premises "would be given a detailed set of written and oral instructions emphasizing the secular purpose of Title I and setting out the rules to be followed to ensure that this purpose was not compromised." Id. Consultations with a student's regular classroom teacher were limited to "mutual professional concerns regarding the student's education." Id. at ----, 117 S.Ct. at 2005. Finally, "a publicly employed field supervisor was to attempt to make at least one unannounced visit to each teacher's classroom every month." Id.

In 1987 six federal taxpayers sued claiming that the Board's Title I program violated the Establishment Clause. At the conclusion of the dispute's first lap through the Federal court system, the Supreme Court affirmed the decision of the Second Circuit, holding that the program was unconstitutional because it "necessitated an 'excessive entanglement of church and state in the administration of

[Title I] benefits.'" Agostini, at ----, 117 S.Ct. at 2005, quoting Aguilar, 473 U.S. at 414, 105 S.Ct. 3232. Consequently, on remand the district court permanently enjoined the Board of Education from allowing State-funded "public school teachers and guidance counselors to provide teaching services on the premises of sectarian schools within New York City." Agostini, at ----, 117 S.Ct. at 2005.

In 1995, the Board, together with a group of parents of parochial school children entitled to Title I services, moved the District Court under Federal Rule of Civil Procedure 60(b), seeking relief from the permanent injunction on the grounds that the "decisional law [had] changed to make legal what the [injunction] was designed to prevent." Id. at ----, 117 S.Ct. at 2006, quoting Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 388, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992). Both the district court and the Second Circuit denied relief, but the Supreme Court reversed and vacated the injunction. Agostini, at ----, 117 S.Ct. at 2019.

The central question before the Court in Agostini was "whether Aguilar [had] been eroded by [the Court's] subsequent Establishment Clause cases." Id. at ----, 117 S.Ct. at 2008. To answer it, the Court first had to discuss the underpinnings of Aguilar and its companion case, Ball:

> Distilled to essentials, the Court's conclusion that the Shared Time program in Ball had the impermissible effect of advancing religion rested on three assumptions: (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and, (iii) any and all public aid that directly aids the educational function of religious schools

> impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking. Additionally, in Aguilar there was a fourth assumption: that New York City's Title I program necessitated an excessive entanglement with religion because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion.

Agostini, at ----, 117 S.Ct. at 2010. The Court then proceeded to demonstrate how its intervening decisions had "undermined the assumptions upon which Ball and Aguilar relied." Id.

While the Court reaffirmed the bedrock principle that "government inculcation of religious beliefs has the impermissible effect of advancing religion," the Court found that cases subsequent to Aguilar had "modified in two significant respects the approach [it] use[s] to assess indoctrination." Agostini, at ----, 117 S.Ct. at 2010. The first sea-change the Court noted in its indoctrination analysis was that it had:

> abandoned the presumption erected in Meek and Ball that the placement of public school employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion.

Id., citing Zobrest, 509 U.S. at 13, 113 S.Ct. 2462. No longer, then, would a public employee ***358** on sectarian school property "be presumed to inculcate religion in the students," without evidence to the contrary. Agostini, at ----, 117 S.Ct. at 2011; see also id. at ----, 117 S.Ct. at 2012

("Certainly, no evidence has ever shown that any New York City Title I instructor teaching on parochial school premises attempted to inculcate religion in students."). Nor would the mere presence of a public employee on the premises of a religious school "create[ ] an impermissible 'symbolic link' between government and religion." Id. at ----, 117 S.Ct. at 2011. The Court thus demolished with one swift stroke the first two assumptions upon which Ball had stood. See id. at ----, 117 S.Ct. at 2010.

[1] The second "significant" alteration the Court noted was that it had "departed from the rule relied on in Ball that all government aid that directly aids the educational function of religious schools is invalid." Id. at ----, 117 S.Ct. at 2011 (emphasis added). The Court, however, was somewhat cryptic about how one might distinguish between valid and invalid government aid that "directly aids the educational function of religious schools." From the Court's reliance on Zobrest, supra, and also on Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986), however, we can glean the kinds of requirements the Court might demand of such aid. First, it was crucial in the Court's view that any aid be neutral--that is, that any aid be "made available generally without regard to the sectarian-nonsectarian, public-nonpublic nature of the institution benefited." Agostini, at ----, 117 S.Ct. at 2011, quoting Witters, 474 U.S. at 487, 106 S.Ct. 748. Second, the Court required that "any money that ultimately went to religious institutions did so 'only as a result of the genuinely independent and private choices of' individuals." Agostini, at ---- - ----, 117 S.Ct. at 2011-12, quoting Witters, 474 U.S. at 487, 106 S.Ct. 748. Relative to the second requirement, the Court noted that an aid program's eligibility criteria may ensure that the aid flows to sectarian institutions only as a "result of the private decision of individual parents" (i.e., if the aid is given based on factors unrelated to religion, the

fact that some aid is channeled to religious schools is a function of the parents' decision to send their children to such schools and therefore "[can] not be attributed to state decisionmaking."). Agostini, at ----, 117 S.Ct. at 2012, citing Zobrest, 509 U.S. at 10, 113 S.Ct. 2462. Finally, the aid cannot "indirectly finance religious education by 'reliev[ing] the sectarian schoo[l] of costs [it] otherwise would have borne in educating [its] students.'" Agostini, at ----, 117 S.Ct. at 2012, citing Zobrest, 509 U.S. at 12, 113 S.Ct. 2462. [FN9]

> FN9. The Court also observed that whether the aid is provided to one student, as it was in Zobrest, or to several students at once, as it was in Agostini, "is not constitutionally significant." Agostini, at ----, 117 S.Ct. at 2013.

[2] The criteria by which an aid program identifies its beneficiaries may, in the Court's view, advance religion in another way: "the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination." Agostini, at ----, 117 S.Ct. at 2014, citing Witters, 474 U.S. at 488, 106 S.Ct. 748, and Zobrest, 509 U.S. at 10, 113 S.Ct. 2462. The Court provided a test for determining whether aid criteria create such an incentive:

> This incentive is not present, however, when the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion.

Agostini, at ----, 117 S.Ct. at 2014, citing Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). When assessing whether an aid program has the impermissible effect of advancing religion, then, the criteria by which that aid is allocated are relevant in two distinct ways: whether any use of the aid to indoctrinate religion can be attributed to the state, and, whether the criteria themselves create a financial incentive to undertake religious indoctrination. See Agostini, at ----, 117 S.Ct. at 2014.

[3] The Court in Agostini expressly treated the "entanglement" prong (often regarded ***359** as the third prong--see, e.g., Mueller, 463 U.S. at 394, 103 S.Ct. 3062) of the Lemon test as "an aspect of the inquiry into a statute's effect." Agostini, at ----, 117 S.Ct. at 2015, citing Walz v. Tax Com'n of the City of New York, 397 U.S. 664, 674, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). The Court did so observing that, regardless how it had characterized the "entanglement" inquiry in prior cases, "the factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect.'" Agostini, at ----, 117 S.Ct. at 2015. Those factors include (1) "the character and purposes of the institutions benefited," (2) "the nature of the aid that the State provides," and, (3) "the resulting relationship between the government and religious authority." Id.

The Court emphasized that not every entanglement between government and religion offends the Constitution:

> Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two. Entanglement must be "excessive" before it runs afoul of the Establishment Clause.

Agostini, at ----, 117 S.Ct. at 2015 (citations omitted). The Aguilar Court found that the Board's Title I program fostered excessive entanglement for three reasons: (1) "the program would require pervasive monitoring by public employees to ensure that Title I employees did not inculcate religion"; (2) "the program required administrative cooperation between the Board and parochial schools"; and, (3) "the program might increase the dangers of political divisiveness." Id., citing Aguilar, 473 U.S. at 413-14, 105 S.Ct. 3232 (internal quotes omitted). The Agostini Court began, however, by observing that the last two grounds cannot, in and of themselves, create an excessive entanglement, since "[t]hey are present no matter where Title I services are offered, and no court has held that Title I services cannot be offered off-campus." Agostini, at ----, 117 S.Ct. at 2015.

[4] More importantly, the Court remarked that, since it had abandoned the assumption that public employees on sectarian school premises will inevitably inculcate religion,

> we must also discard the assumption that pervasive monitoring of Title I teachers is required. There is no suggestion in the record before us that unannounced monthly visits of public supervisors are insufficient to prevent or to detect inculcation of religion by public employees. Moreover, we have not found excessive entanglement in cases in which States imposed far more onerous burdens on religious institutions than the monitoring system at issue here.

Agostini, at ----, 117 S.Ct. at 2016, referring to Bowen, 487 U.S. at 615-17, 108 S.Ct. 2562 (emphasis added). Thus, the Court will now require evidence demonstrating the insufficiency of a particular monitoring system before it will

conclude that public teachers on parochial school grounds are impermissibly inculcating religion.

The Court concluded with the following language:

> To summarize, New York City's Title I program does not run afoul of any of the three criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.

Agostini, at ----, 117 S.Ct. at 2016. The Court then stated its holding:

> We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here. The same considerations that justify this holding require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion. Accordingly, we must acknowledge that Aguilar, as well as the portion of Ball ***360** addressing Grand Rapids' Shared Time program, are no longer good law.

Id (emphasis added).

2.

For our purposes, Agostini is as important for what it did not hold as for what it did. As the emphasized language at the

end of the last section shows, Agostini only overruled that part of Ball dealing with the Shared Time program. See also Agostini, at ----, 117 S.Ct. at 2016 ("... overruling Aguilar and those portions of Ball inconsistent with our more recent decisions."). Agostini explicitly left intact that part of Ball which struck down the Community Education program. See id.; see also Agostini, at ---- n. 1, 117 S.Ct. at 2019 n. 1 (Souter, J., dissenting). We believe that contrasting the two programs in Ball will further illuminate the meaning of Agostini, for while the Shared Time program is constitutional under Agostini, presumably the Community Education program is not.

The Shared Time program offered classes during the regular schooldays that were "supplementary" to State-required core curriculum courses. [FN10] See Ball, 473 U.S. at 375, 105 S.Ct. 3216. By contrast, the Community Education program offered courses to children and adults that commenced after the regular schooldays. Id. at 376, 105 S.Ct. 3216. [FN11] Courses offered included Arts and Crafts, Home Economics, Spanish, Gymnastics, Yearbook Production, Christmas Arts and Crafts, Drama, Newspaper, Humanities, Chess, Model Building, and Nature Appreciation. Id. at 376-77, 105 S.Ct. 3216. The Court did not indicate that the Community Education courses were intended to be "supplementary" to core curriculum subjects. There was evidence that both Shared Time and Community Education courses taught at nonpublic schools were also available, perhaps in a different format, in public schools. Id.

> FN10. For example, the Shared Time program offers courses such as "remedial" and "enrichment" mathematics, reading, art, music, and physical education. Id.

> FN11. The appeal in Ball "involved only Shared Time classes at the elementary level, Community Education classes at the elementary level, and the remedial mathematics Shared Time Program at the secondary level." Id. at 376 n. 1, 105 S.Ct. 3216.

The Ball Court noted that "[b]oth programs [were] administered similarly." Id. at 377, 105 S.Ct. 3216. For example, nonpublic school administrators decided which courses to offer, based on a list of courses provided by the Director of the program, a public school employee. Id. Nonpublic administrators also decided which classrooms would be used for the programs, subject to inspection of the facilities by the same Director. Id. The public school system "leased" the classrooms from the nonpublic schools for a nominal weekly charge. Id. The leased classrooms had to be free of any religious symbols, although religious symbols "[could] be present in the adjoining hallways, corridors, and other facilities used in connection with the program." Id. at 378, 105 S.Ct. 3216. The program teacher was required to post a sign outside the classroom stating that it was a "public school classroom." Id.

The most important difference between the two programs was the status of their teachers. See id. at 387, 105 S.Ct. 3216. The Shared Time teachers were "full-time employees of the public schools." Id. at 376, 105 S.Ct. 3216. In stark contrast,

> Community Education teachers are part-time public school employees. (...) Because a well-known teacher is necessary to attract the requisite number of students, the School District accords a preference in hiring to instructors already teaching within the school. Thus, virtually every Community education course conducted on facilities leased from nonpublic

> schools has an instructor otherwise employed full time by the same nonpublic school.

Ball, 473 U.S. at 377, 105 S.Ct. 3216 (emphasis added). While it is true that approximately 10% of the Shared Time teachers "previously taught in nonpublic schools, and many of those had been assigned to the same nonpublic school where they were previously employed," no Shared Time teachers were concurrent employees of both the nonpublic *361 schools and the public school system. See id. at 376, 105 S.Ct. 3216.

Although the Ball majority invalidated both programs, its discussion of the Community Education program focused on the dual roles of that program's teachers:

> These [Community Education] instructors, many of whom no doubt teach in the religious school precisely because they are adherents of the controlling denomination and want to serve their religious community zealously, are expected during the regular schooldays to inculcate their students with the tenets and beliefs of their particular religious faiths. Yet the premise of the [Community Education] program is that those instructors can put aside their religious convictions and engage in entirely secular Community Education instruction as soon as the schooldays is over. Moreover, they are expected to do so before the same religious school students and in the same religious school classrooms that they employed to advance religious purposes during the "official" schooldays. Nonetheless, as petitioners themselves asserted, Community Education classes are not specifically monitored for religious content.

Ball, 473 U.S. at 386-87, 105 S.Ct. 3216. Given the "conflict of functions inhere[nt] in the situation," the Court found "a substantial risk that, overtly or subtly, the religious message [the teachers] are expected to convey during the regular schooldays will infuse the supposedly secular classes they teach after school." Id. at 387, 105 S.Ct. 3216, in part quoting Lemon, 403 U.S. at 618-19, 91 S.Ct. 2105. The Court was careful not to impugn the integrity of the Community Education teachers, but it nonetheless found a substantial risk of inculcation "because the pressures of the environment might alter [their] behavior from its normal course." Ball, 473 U.S. at 387, 105 S.Ct. 3216, citing Wolman v. Walter, 433 U.S. 229, 247, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977).

The Ball Court also found a "substantial risk of state-sponsored indoctrination" in the Shared Time program. Ball, 473 U.S. at 387, 105 S.Ct. 3216. Notably, however, the Court did so by indulging in an assumption that the Agostini Court has now expressly disavowed--i.e., the assumption that public employees teaching on the premises of sectarian schools "may well subtly (or overtly) conform their instruction to the environment in which they teach...." Id. at 388, 105 S.Ct. 3216. The quoted language encapsulates what the Agostini court identified as the first of three now-abandoned assumptions on which Ball relied. See Agostini, at ----, 117 S.Ct. at 2010; see also discussion supra Part II.C.1. By contrast, the Court invalidated the Community Education program, not because of any unfounded assumptions about public employees' behavior, but instead because of the genuine "conflict of functions" present when a teacher must fill two mutually- exclusive roles in the course of a single schoolday. See Ball, 473 U.S. at 387, 105 S.Ct. 3216.

A few other aspects of Ball bear noting. First, the Court gave no weight to whether the courses offered by either program were "supplemental." Even if the courses offered were, as a matter of fact, "supplemental" insofar as they were not then offered by the nonpublic school, the Court observed that "there is no way of knowing whether the religious schools would have offered some or all of these courses if the public school system had not offered them first." Id. at 396, 105 S.Ct. 3216. Instead of focusing on the "remedial" or "enrichment" aspects of the courses, the Court looked more broadly to their "general subject matter" (reading, mathematics, etc.), which was "surely a part of the curriculum in the past...." Id. Thus, "the concerns of the Establishment Clause may ... be triggered despite the 'supplemental' nature of the courses." Id.

Second, the Court noted that "respondents adduced no evidence of specific incidents of religious indoctrination in this case." Id. at 388, 105 S.Ct. 3216. Nonetheless, the Court frankly observed that "the absence of proof of specific incidents is not dispositive," because neither the religious schools nor the teachers, parents and students would have any incentive "to complain if the effect of the publicly supported instruction were to advance the schools' sectarian mission." Id. at 388-89, 105 S.Ct. 3216. The Court had earlier noted that neither the Community Education ***362** nor the Shared Time program was monitored for religious content. See id. at 387, 105 S.Ct. 3216.

Finally, we think it especially noteworthy that Justice O'Connor (the author of Agostini) and (then) Chief Justice Burger dissented in Ball, but only as to the Shared Time program. Both invalidated the Community Education program. See Ball, 473 U.S. at 398, 105 S.Ct. 3216 (Burger, C.J., concurring in the judgment in part and dissenting in part), and 473 U.S. at 398-400, 105 S.Ct. 3216 (O'Connor, J.,

concurring in the judgment in part and dissenting in part). Because Justice O'Connor gave specific reasons for distinguishing the two programs, we reproduce here the final paragraph of her partial concurrence:

> I agree with the Court, however, that the Community Education program violates the Establishment Clause. The record indicates that Community Education courses in the parochial schools are overwhelmingly taught by instructors who are current full-time employees of the parochial school. The teachers offer secular subjects to the same parochial school students who attend their regular parochial school classes. In addition, the supervisors of the Community Education program in the parochial schools are by and large the principals of the very schools where the classes are offered. When full-time parochial school teachers receive public funds to teach secular courses to their parochial school students under parochial school supervision, I agree that the program has the perceived and actual effect of advancing the religious aims of the church-related schools. This is particularly the case where, as here, religion pervades the curriculum and the teachers are accustomed to bring religion to play in everything they teach. I concur in the judgment of the Court that the Community Education program violates the Establishment Clause.

Id. at 398-400, 117 S.Ct. 1997 (O'Connor, J., concurring in the judgment in part and dissenting in part).

D.

Having in some degree clarified the legal principles governing our discussion, we now apply them to the

Louisiana special education program, as administered in Jefferson Parish. Naturally, we walk within the path recently marked out in Agostini. At the same time, however, we are mindful that this is an area of constitutional law that is not blessed with easy answers. The most concrete tools at our disposal are the actual school aid programs the Supreme Court has either validated or invalidated. Thus, although we apply the analysis of Agostini, our ultimate goal is to determine whether the Louisiana special education statute is more like the constitutional aid programs approved by Agostini (i.e., the New York City program and the Grand Rapids Shared Time program) or more like the unconstitutional program condemned by Ball (the Community Education program). See, e.g., Mueller, 463 U.S. at 393-94, 103 S.Ct. 3062 (employing a similarly "comparative" analysis).

[5][6] As we read Agostini, the Supreme Court has not abandoned, nor even fundamentally changed, the Lemon test. See Agostini, at ----, 117 S.Ct. at 2010 ("To be sure, the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since Aguilar was decided."). The first prong of Lemon, which asks whether a statute has a secular legislative purpose, remains unchanged. See Lemon, 403 U.S. at 612-13, 91 S.Ct. 2105. The Court has, however, somewhat altered its "understanding of the criteria used to assess whether aid to religion has an impermissible effect." Id. Specifically, the Court has abandoned three of the assumptions which underlay the second ("effects") prong of Lemon in prior cases. Id.; see also discussion supra Part II.C.1. The Court has also expressly recognized that the third ("entanglement") prong of Lemon is more properly addressed as an aspect of the "effects" prong. Agostini, at ----, 117 S.Ct. at 2015. It thus seems that, fairly restated, the post- Agostini Lemon test

includes the first ("secular purpose") prong plus the following, re-tooled "effects" prong:

> [T]he three criteria we currently use to evaluate whether government aid has the effect of advancing religion: [does the aid] ***363** result in governmental indoctrination[?]; [does the aid] define its recipients by reference to religion[?]; or [does the aid] create an excessive entanglement[?]

Agostini, at ----, 117 S.Ct. at 2016 (brackets added).

1.

[7] The Supreme Court has consistently found that even those State laws that run afoul of other aspects of Lemon may nonetheless have a "secular legislative purpose." See Mueller, 463 U.S. at 394, 103 S.Ct. 3062. Following the Court's lead, then, we will exhibit a "reluctance [in] attribut [ing] unconstitutional motives" to the State of Louisiana as we examine whether "a plausible secular purpose for the state's program may be discerned from the face of the statute." Id. at 394-95, 103 S.Ct. 3062.

We need not look far. The avowed purpose of the special education statute is "to assure and require that the state shall fund a program of special education and related services for the exceptional children of the state." La.Rev.Stat.Ann. § 17:1942 (West 1982). Nothing on the face of the statute belies the Legislature's purely secular aims in enacting it. Indeed, one of the public policies announced in the statute is to "prevent denials of equal educational opportunities on the basis of national origin, sex, economic status, race, religion, and physical or mental handicap or other exceptionalities in the provision of appropriate, free publicly supported education." La.Rev.Stat.Ann. § 17:1941 (West

1982)(emphasis added). We find that the equitable provision of special education services to exceptional children is a "secular legislative purpose" under Lemon. See, e.g., Witters, 474 U.S. at 485-86, 106 S.Ct. 748.

2.

[8] The government may not participate in the indoctrination of religion, because such government activity "has the impermissible effect of advancing religion." Agostini, at ----, 117 S.Ct. at 2010; see Lemon, 403 U.S. at 612, 91 S.Ct. 2105. It is as easy to agree with such a proposition in the abstract as it is difficult to apply it to a particular governmental program. The Lemon Court itself remarked that "the line of separation [between church and state], far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on the circumstances of a particular relationship." Lemon, 403 U.S. at 614, 91 S.Ct. 2105.

a.

[9][10] Regarding indoctrination, Agostini first instructs us that the mere presence of a publicly paid teacher on sectarian school premises will no longer give rise to the presumption that those teachers will inculcate religion in their students. See Agostini, at ----, 117 S.Ct. at 2011. The record in this case discloses no evidence whatsoever that any of the special education teachers at the eight Jefferson Parish parochial schools have ever attempted to indoctrinate their students. The special education teachers are bound by law to teach only what is included in a student's IEP, and an IEP cannot describe religious instruction. We will not presume that qualified, conscientious state employees are violating the law.

The employment status of these special education teachers falls somewhere between the Title I instructors in Agostini and the Community Education teachers in Ball. The Jefferson Parish special education teachers are full-time public employees who are not concurrently employed by the parochial schools where they work. Thus, they do not suffer from the "conflict of functions" present in the Community Education teachers in Ball. See Ball, 473 U.S. at 387, 105 S.Ct. 3216. Unlike the Agostini teachers, however, the Jefferson Parish teachers are, in a sense, "permanently" assigned to their respective parochial schools under the terms of the Collective Bargaining Agreement. The Jefferson Parish teachers do not move from school to school, as the Agostini teachers do, and many of the Jefferson Parish teachers share the religious affiliation of their schools. See Agostini, at ----, 117 S.Ct. at 2004. We observe, however, that the Shared Time teachers in Ball were, in a significant number of cases, former employees of the schools at which they subsequently worked as State-*364 paid teachers. See Ball, 473 U.S. at 376, 105 S.Ct. 3216.

Naturally, the Jefferson Parish special education teachers have frequent contacts with their fellow sectarian teachers and the sectarian principals. The special education teacher may even consider him or herself an informal member of the parochial faculty, as evidenced by the fact that special education teachers attend monthly faculty meetings. But, while admitting that we strike a fine balance, we do not find that the Jefferson Parish special education teachers labor under the same, irreconcilable "conflict of functions" that spelled doom for the Community Education program in Ball, supra. The Jefferson Parish teachers are simply not asked to act in the capacity of a "religious school" teacher during one part of the day, and then to assume the purely secular role of a publicly-funded special education teacher during another.

We are somewhat troubled by the evidence indicating that the special education teachers are monitored by both public and sectarian entities. The record shows that special education teachers are subject to infrequent visits by state personnel and are otherwise subject to the regular, albeit non-personal, supervision of state IEP specialists. The record also shows, however, that SESC executive director Janz as well as the parochial school principals exercise some level of supervision over the special education teachers.

If the State delegated its supervisory authority over the special education program to the sectarian schools themselves, or to a sectarian institution such as the SESC, then the program might not withstand scrutiny under the Establishment Clause. See, e.g., Wolman v. Walter, 433 U.S. 229, 252-55, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977). We are not persuaded, however, that the State has abdicated its review of the substance of the special education instruction to the sectarian institutions. While the record does show limited supervision of the teachers by the SESC and the parochial school principals, that supervision seems more related to administrative matters than to assuring that the special education teachers do not impart religion to the students. The State, through its monitoring visits and through the IEP process, has retained sufficient authority over the substantive aspects of the special education instruction.

Agostini also instructs us that the mere presence of a publicly-paid teacher on religious school premises will no longer "create[ ] an impermissible 'symbolic link' between government and religion." Agostini, at ----, 117 S.Ct. at 2011. We need not long belabor this point, because the record discloses no evidence that the special education program has done anything more than place its teachers on sectarian school premises. [FN12] The fact that many of the teachers were formerly employed by the same schools is

insufficient to create a "symbolic link" between church and state, given that many of the Shared Time teachers in Ball shared a similar employment history. See Ball, 473 U.S. at 376, 105 S.Ct. 3216. Our view is not altered by the fact that the special education teachers have limited "administrative ties" to the parochial schools--i.e., they attend monthly faculty meetings; they can be assigned bus duty or lunch duty; etc. If the Supreme Court found it neither "sensible" nor "sound" to make a program's constitutionality depend on where services were provided, we find it equally nonsensical and unsound to make its constitutionality turn on whether state- paid teachers attend faculty meetings or perform lunch duty. See Agostini, at ----, 117 S.Ct. at 2012.

> FN12. While we certainly do not place our imprimatur on the presence of religious symbols in state-funded special education classrooms, the evidence indicating the presence, in one instance, of a crucifix in a classroom is insufficient to show that the Jefferson Parish special education program has created a "symbolic link" between church and state. Other evidence indicates that program monitors would remove such a symbol if they found it in a classroom, even though the State of Louisiana does not have an articulated policy requiring inspection for, and removal of, religious symbols from public classrooms.

Finally, Agostini informs us that not every form of government aid that "directly aids the educational function of religious schools is invalid." Id. at ----, 117 S.Ct. at 2011. In distinguishing between valid and invalid ***365** direct aid, we look, per Agostini, to the criteria for distributing the aid and for identifying its beneficiaries, the means by which any of the aid might potentially benefit religious schools, and whether the aid "relieve [s] sectarian schools of costs they

otherwise would have borne in educating their students." Id. at ----, 117 S.Ct. at 2012, citing Zobrest, 509 U.S. at 12, 113 S.Ct. 2462. As discussed before, the district court found that State funds are awarded to Jefferson Parish based on the number of exceptional students there. See discussion supra Part II.A. Whether or not a student qualifies as "exceptional" depends on entirely secular statutory criteria. See supra note 2; see also La.Rev.Stat.Ann. § 1943(2)(West Supp.1998). Thus, the statutory scheme implementing the special education program shows that any aid is "made available generally without regard to the sectarian-nonsectarian, public-nonpublic nature of the institution benefitted." Agostini, at ----, 117 S.Ct. at 2011, quoting Witters, 474 U.S. at 487, 106 S.Ct. 748.

Agostini seemed to require that "any money that ultimately went to [the sectarian schools] 'did so only as a result of the genuinely independent and private choices of' individuals." Agostini, at ---- - ----, 117 S.Ct. at 2011-12, quoting Witters, 474 U.S. at 487, 106 S.Ct. 748; see also Zobrest, 509 U.S. at 9, 113 S.Ct. 2462. Relative to this requirement, the Court instructs us to examine the criteria by which the challenged program selects its recipients. Agostini, at ----, 117 S.Ct. at 2012. As we observed above, the Louisiana special education program selects its recipients based solely on the "exceptionality" of a particular student and on the number of exceptional students enrolled in a given school district. The fact that a particular exceptional student is enrolled in a particular school, be it sectarian or nonsectarian, results from a parental and not a governmental decision. Thus, any aid flowing incidentally to a sectarian school occurs "only as a result of the genuinely independent and private choices of" those students' parents. See Zobrest, 509 U.S. at 9, 113 S.Ct. 2462.

Finally, Agostini mandates that any incidental benefits accruing to the sectarian schools as a result of the program cannot relieve the schools of costs they "otherwise would have borne in educating [their] students." Agostini, at ----, 117 S.Ct. at 2012. Failure to meet this requirement presupposes that the Jefferson Parish sectarian schools, in the absence of the special education program, would have "otherwise borne" the costs of providing special education services to their exceptional students. But only the State, and not the sectarian schools, has the legal duty to "provide an appropriate, free, publicly supported education to every exceptional child" residing in Louisiana. See La.Rev.Stat.Ann. § 17:1941 (West 1982). Since the sectarian schools are not required to provide such an education, we fail to see how the State's fulfilling its statutory obligation to do so relieves private schools of any burden at all. This case does not present the situation where the State furnishes aid which alleviates a private school's legal duty to provide, for example, a state-mandated core curriculum to its students. Cf. Ball, 473 U.S. at 396-97, 105 S.Ct. 3216.

[11] The district court made much of its conclusion that the sectarian schools receive a "direct economic benefit" as a result of the special education program, in the form of a student's tuition and the surcharge paid by parents to supplement the special education teachers' salaries. See Helms, 856 F.Supp. at 1117-18; see also discussion supra Part II.A. But to view the students' tuition as an "economic benefit" requires the assumptions that "the school makes a profit on each student; that, without the [special education program], the child would have gone to school elsewhere; and that the school, then, would have been unable to fill that child's spot." Zobrest, 509 U.S. at 10-11, 113 S.Ct. 2462. The Supreme Court was unwilling to make such assumptions and regard the deaf student's tuition as an "economic benefit"

in Zobrest. See id. Given the Court's close reliance on Zobrest in Agostini, we are likewise unwilling to make them. See Agostini, at ----, 117 S.Ct. at 2012 ("In all relevant respects, the provision of instructional services under Title I is indistinguishable from the provision of sign-language interpreters under the IDEA."), citing Zobrest, 509 U.S. at 12, 113 S.Ct. 2462.

***366** Additionally, the surcharge required of parochial school parents is merely intended to equalize the salaries of special education teachers working in nonpublic schools to those of special education teachers working in public schools. See Helms, 856 F.Supp. at 1110, 1117. [FN13] We do not view the receipt of such a surcharge from parents as any kind of "economic benefit" to the sectarian schools. The record indicates that the surcharges are paid into accounts earmarked for "special education expenses" and are used exclusively to supplement the salaries of special education teachers. Id. at 1117. The district court thus erred when it considered this surcharge a "direct economic benefit" to the parochial schools. Indeed, there is no discernible "benefit" flowing to the schools from the surcharge; rather, the surcharge represents an economic burden imposed on the parents of parochial school children who wish to secure special education services for their children. The surcharge never reaches, in any meaningful way, the general coffers of the parochial schools.

FN13. In the public schools, this surcharge is paid by the JPSB. Id. at 1110; see discussion supra Part II.A.

b.

[12] We need not long consider whether the criteria by which the special education program selects its beneficiaries "create a financial incentive to undertake religious

indoctrination." Agostini, at ----, 117 S.Ct. at 2014. We have already observed, in Part II.D.2.a, supra, that the Louisiana special education program selects its aid beneficiaries based on neutral, secular criteria: the exceptionality of the child and the number of exceptional students enrolled in Jefferson Parish and in its individual school districts. These are "neutral, secular criteria that neither favor nor disfavor religion, and [the aid] is [therefore] made available to both religious and secular beneficiaries on a nondiscriminatory basis." Agostini, at ----, 117 S.Ct. at 2014. The Louisiana program does not "define its recipients with reference to religion" and therefore creates no financial incentive to undertake religious instruction. Id. at ----, 117 S.Ct. at 2016. Indeed, as the district court stated:

> The Court finds that there was no financial incentive for the parents of special education students to choose a nonpublic school. In fact, it is undisputed that the students would have received special education at no cost in the public schools. Indeed, the parents of special education students elected to pay an extra charge, in addition to the regular tuition, in order for their children to attend a parochial school.

Helms, 856 F.Supp. at 1117.

c.

[13] We likewise discern no "excessive entanglement" created or necessitated by the special education program. Now that the Supreme Court has discarded the presumption that publicly-paid teachers on sectarian school premises will inculcate religion, also relegated to the dustbin is the "assumption that pervasive monitoring of [those teachers] is required." Agostini, at ----, 117 S.Ct. at 2016. We have not

been shown any evidence demonstrating that the monitoring already in place is "insufficient to prevent or to detect inculcation." Id. The district court specifically noted that "[t]he JPPSS special education teachers at nonpublic schools do not teach religion" and that "[t]he special education classrooms are used only for special education instruction." Helms, 856 F.Supp. at 1114. We see no reason to disturb those findings.

E.

In sum, we find that the Louisiana special education program, codified at La.Rev.Stat.Ann. § 17:1941-1956 (West 1982 & West Supp.1998), does not offend the Establishment Clause because (1) the statute has a secular legislative purpose, and (2) the statute does not have the effect of advancing religion. See Agostini, at ----, 117 S.Ct. at 2016. We therefore REVERSE the judgment of the district court and RENDER judgment declaring the Louisiana special education program constitutional as applied in Jefferson Parish.

***367** III.

[14] Plaintiffs also claim that Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965 ("Chapter 2") [FN14] and its Louisiana counterpart, La.Rev.Stat.Ann. § 17:351-52 (West 1982 & West Supp.1998), violate the Establishment Clause as applied in Jefferson Parish insofar as they provide direct aid to sectarian schools in the form of educational and instructional materials. Initially, the district court agreed and granted Plaintiffs' motion for summary judgment, finding that the loan of state-owned instructional materials (such as slide projectors, television sets, tape recorders, maps, globes, computers, etc.) to pervasively sectarian institutions had the "primary effect of providing a

direct and substantial advancement to the sectarian enterprise" and therefore violated the Establishment Clause. The court relied primarily on Wolman v. Walter, 433 U.S. 229, 250, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977), and Meek v. Pittenger, 421 U.S. 349, 363, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975).

> FN14. On October 20, 1994, Congress enacted the Improving America's School Act of 1994, Pub.L. 103-382, 108 Stat. 3518. Former Chapter 2 is now labeled "Subchapter VI--Innovative Education Program Strategies" and is codified at 20 U.S.C. §§ 7301-7373 (West Supp.1998). For ease of reference, we will continue to refer to new Subchapter VI as "Chapter 2." We will cite individual sections, however, by reference to citations in the current United States Code.

When the case was reassigned due to Judge Frederick Heebe's retirement, Judge Marcel Livaudais granted Defendants' motion to reconsider the court's ruling. Following the reasoning of the Ninth Circuit in Walker v. San Francisco Unified School District, 46 F.3d 1449, 1463-70 (1995), Judge Livaudais found that the reasoning in Meek and Wolman, supra, had been undermined by subsequent Supreme Court cases. He therefore reversed Judge Heebe's finding of unconstitutionality and granted Defendants' motion for summary judgment, declaring Chapter 2 and La.Rev.Stat.Ann. § 17:351-52 constitutional, facially and as applied in Jefferson Parish.

A.

Chapter 2 provides financial assistance through "block grants" to state and local educational agencies to implement eight "innovative assistance programs." See 20 U.S.C. §§

7311(b); 7312(a),(c)(1); 7351. The challenged innovative assistance program describes

> programs for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials which are tied to high academic standards and which will be used to improve student achievement and which are part of an overall education reform program.

20 U.S.C. § 7351(b)(2).

Chapter 2 services are to be provided to children enrolled in both "public and private, nonprofit schools." 20 U.S.C. § 7312. Section 7372 provides that a local educational agency shall equitably provide "secular, neutral, and nonideological services, materials, and equipment" to students who are enrolled in private nonprofit elementary and secondary schools within its boundaries. 20 U.S.C. § 7372(a)(1). Chapter 2 funds for the innovative assistance programs must supplement, and in no case supplant, "funds from non-Federal sources." 20 U.S.C. § 7371(b). The control of Chapter 2 funds, as well as title to all Chapter 2 "materials, equipment, and property," must be in a public agency, "and a public agency shall administer such funds and property." 20 U.S.C. § 7372(c)(1). In addition, any services provided for the benefit of private school students must be provided by a public agency or through a contractor who is "independent of such private school and of any religious organizations." 20 U.S.C. § 7372(c)(2).

Once Louisiana receives its Chapter 2 funds from the Federal government, the designated State Educational Agency

("SEA") allocates 80 percent of the funds to Local Educational Agencies ("LEAs"). Eighty-five percent of those funds are earmarked for LEAs based on the number of participating elementary and secondary school students in both public and private, nonprofit schools; ***368** 15% go to LEAs based on the number of children from low-income families. See 20 U.S.C. § 7312(a). During the fiscal year 1984-85, Jefferson Parish received $655,671 in Chapter 2 funds; about 70% of those funds were allocated to public schools and about 30% to nonpublic schools.

In 1984, the State instituted a monitoring process to ensure that Chapter 2 materials were not being used for religious purposes. Nonpublic schools were encouraged but not required to sign assurances that they would only use loaned materials for secular purposes. Additionally, LEAs made monitoring visits to nonpublic schools, and the State made monitoring visits to the LEAs and to some nonpublic schools. After the United States Department of Education conducted an on-site visit to review the Louisiana Chapter 2 program in September, 1984, the Louisiana Department of Education made changes in monitoring LEAs. It increased, for example, the frequency of on-site visits by the Chapter 2 staff to LEAs from once every three years to once every two years.

The State also began reviewing the LEAs' monitoring process of the private schools. LEAs, however, have primary responsibility in Louisiana for monitoring their Chapter 2 programs and for compliance with all applicable State and Federal guidelines. When State Chapter 2 monitors visited the JPPSS in April, 1985, the monitors found that "the services, materials, equipment, [and] other benefits provided to nonpublic schools" in Jefferson Parish were not "neutral, secular and non-ideological."

A report of that evaluation prepared by the Bureau of Evaluation indicates that, while the LEAs "handle most of the administrative matters related to Chapter 2, the nonpublic schools make the decisions about how to spend their Chapter 2 allocations, and they do so independently of one another." The report also states that "[e]xcept that funds cannot be spent for support of religious or ideological instruction, flexibility in the use of Chapter 2 funds puts a minimum of limitations on the kinds of expenditures allowed." During the 1986-87 fiscal year, for example, of the total amount of Chapter 2 funds budgeted for nonpublic schools ($214,080), $94,758 was spent to provide library/media materials, $102,862 was spent for instructional equipment, and $16,460 was spent for "local improvement programs."

Ruth Woodward, the Coordinator of the Chapter 2 program in Jefferson Parish, stated that library books are ordered for nonpublic schools, but not for public schools. Such library books are stamped "ECIA Chapter 2." Woodward reviews the titles of books and other Chapter 2 materials and deletes titles she finds inappropriate. After reviewing library book orders from 1982, Woodward discovered approximately 191 titles in violation of Chapter 2 guidelines and had the books recalled and donated to the public library.

Woodward also stated that she generally makes a single visit to a given nonpublic school during the year. During her monitoring visits, she stated that she has "normally" found that the Chapter 2 materials and equipment are used in accordance with Chapter 2 guidelines. A review of the instructional materials purchased with Chapter 2 funds during 1986-87 and loaned to nonpublic, parochial schools reveals the following kinds of items: filmstrip projectors, overhead projectors, television sets, motion picture projectors, video cassette recorders, video camcorders, computers, printers, phonographs, slide projectors, etc.

Woodward stated that no direct payments of Chapter 2 funds are ever made to nonpublic schools; the funds are retained and administered by her office.

The Louisiana counterpart to Chapter 2, LA.REV.STAT.ANN. § 17:351-52 (West 1982 & West Supp.1998), requires the State Board of Elementary and Secondary Education to "prescribe and adopt school books and other materials of instruction, which it shall supply without charge to the children of [Louisiana] at the elementary and secondary levels...." La.Rev.Stat.Ann. § 17:351(A)(1)(West Supp.1998). The statute also requires that the Board, or the State Department of Education, ensure that any books or instructional materials provided "are thoroughly screened, reviewed, and approved as to their content...." La.Rev.Stat.Ann. ***369** § 17:352(A)(1)(West Supp.1998). [FN15] Judge Livaudais noted that an "overwhelming portion" of funds allocated under the Louisiana statute are used to purchase textbooks, and that Plaintiffs have not challenged this application of the statute.

> FN15. An additional section, creating a "Teacher Supplies Fund," became effective June 30, 1997, after Judge Livaudais granted Defendants' motion for summary judgment. See La.Rev.Stat.Ann. § 17:354 (West Supp.1998), added by Acts 1997, No. 473, § 1, eff. June 30, 1997. Section 354 is not at issue in this appeal, but we note in passing that it provides, inter alia, State funds "for the purchase and loan of teaching materials and supplies" to nonpublic schools, under constraints similar to those in Chapter 2.

Deposition testimony indicated that library reference books purchased pursuant to La.Rev.Stat.Ann. § 17:351 are ordered from lists approved by the Louisiana Board of Elementary

and Secondary Education. Additionally, books and instructional materials may only be ordered from state-approved lists and sources.

B.

We will focus on the Ninth Circuit's decision in Walker, supra, because Judge Livaudais relied heavily on its reasoning and also because it is the only other Circuit decision to have addressed the constitutionality of Chapter 2.

In Walker, a panel of the Ninth Circuit confronted a Chapter 2 program that was, in all relevant respects, identical to the one we confront in Jefferson Parish. [FN16] The most significant aspect of the Walker panel's reasoning is devoted to assessing whether Chapter 2 has a "primary or principal effect of advancing religion." [FN17] Walker, 46 F.3d at 1464- 69. The panel began by observing that, with the cases of Meek, Wolman and Board of Education v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), the Supreme Court "drew a [constitutional] distinction between providing textbooks and providing other instructional materials--such as maps, overhead projectors, and lab equipment--to parochial schools or their students." Walker, 46 F.3d at 1464-65; see Allen, 392 U.S. at 248, 88 S.Ct. 1923; Meek, 421 U.S. at 362-63, 95 S.Ct. 1753; Wolman, 433 U.S. at 237, 97 S.Ct. 2593. The panel, however, was not convinced that such a distinction was still the law. In its view, subsequent Supreme Court cases-- particularly, Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646, 100 S.Ct. 840, 63 L.Ed.2d 94 (1980), Ball, supra, and Zobrest, supra--had "clarified the holdings of Meek and Wolman, and rendered untenable the thin distinction between textbooks and other instructional materials." Walker, 46 F.3d at 1465. The Ninth Circuit thus held that "under Chapter 2, the loaning of neutral, secular equipment

and instructional materials to parochial schools does not have the primary or principal effect of advancing religion." Id.

> FN16. Aside from the identical statutory provision governing the Walker program, the percentage distribution of Chapter 2 funds for the 1988-89 school year were substantially similar to figures for the Jefferson Parish program: 74% of Chapter 2 benefits to public schools and 26% to private schools in Walker, compared to, e.g., a 70%/30% split in Jefferson Parish during the 1984-85 school year.

> FN17. The panel easily concluded that Chapter 2 has the valid secular purpose of "improv[ing] education." Walker, 46 F.3d at 1464, citing Meek, 421 U.S. at 363, 95 S.Ct. 1753.

The panel read Meek as an illogical departure from Allen, which had upheld a law requiring public school authorities to lend textbooks, free of charge, to both public and private school students. Allen, 392 U.S. at 248, 88 S.Ct. 1923. The panel pointed out that "Allen ... rests on the robust principle that 'the Establishment Clause does not prohibit a State from extending the benefits of state laws to all citizens without regard for their religious affiliation.' " Walker, 46 F.3d at 1465, quoting Allen, 392 U.S. at 242, 88 S.Ct. 1923. In the panel's view, however, the Court's subsequent decision in Meek departed from Allen 's reliance on neutrality when Meek "upheld the provision of textbooks to parochial school students, but struck down the program which loaned instructional materials and equipment...." Walker, 46 F.3d at 1465 (citations omitted); see Meek, 421 U.S. at 362, 365-66, 95 S.Ct. 1753.

***370** Even though the Court's subsequent decision in Wolman explicitly upheld Meek, the Walker panel believed that "[i]n reaffirming Meek 's holding ... Wolman undermined Meek 's rationale." Walker, 46 F.3d at 1465; see Wolman, 433 U.S. at 238 (upholding Meek and Allen). Specifically, the panel concluded that Wolman had "eviscerated" Meek 's premise that "any state aid to the educational functions of a sectarian school is forbidden." Walker, 46 F.3d at 1465. Wolman did so, the panel reasoned, by "holding as constitutional a statute under which the State prepared and graded tests in secular subjects" for both public and private, parochial schools. Id. Thus, the Walker panel announced that the paltry sum of Meek and Wolman was

> the thin distinction--unmoored from any Establishment Clause principles--that state loans to parochial schools of instructional materials and equipment impermissibly advances religion, but state preparation and grading of tests and state loans of textbooks do not.

Walker, 46 F.3d at 1466.

In the panel's estimation, the true death-blow to Meek 's textbooks vs. other instructional materials dichotomy came three years later in Regan, which "recognized this weak distinction and clarified that the provision of instructional materials and equipment to parochial schools is not always prohibited." Walker, 46 F.3d at 1466. But, as the panel recognized in the next sentence, Regan merely reaffirmed Wolman by "uph[olding] a law reimbursing parochial schools for the costs of administering tests required by the State." Id.; see Regan, 444 U.S. at 655, 100 S.Ct. 840 ("We agree with the District Court that Wolman controls this case."). Although Regan did not deal with the provision of

instructional materials to parochial schools, and although Regan explicitly followed Wolman and said nothing about overruling Meek, the Walker panel nonetheless declared with perfect candor that

> Regan thus instructs us that the difference between textbooks and other instructional equipment and materials, such as science kits and maps, is not of constitutional significance.

Walker, 46 F.3d at 1466. In our view, such a statement could only mean that the panel thought Regan silently overruled Meek.

The Walker panel thus adopted an Establishment Clause analysis based on what it identified as "the underlying principle animating Establishment Clause jurisprudence: government neutrality towards religion." Id. at 1466, citing, inter alia, Zobrest, 509 U.S. at 10, 113 S.Ct. 2462. The panel stated its "test" as follows:

> Government neutrality becomes suspect when, in practical effect, the governmental aid is targeted at or disproportionately benefits religious institutions, or when, in symbolic effect, the governmental aid creates a symbolic union between church and state.

Walker, 46 F.3d at 1467. Applying its test, the panel easily found that Chapter 2 passed constitutional muster. First, it found that Chapter 2 benefits were "neutrally available without regard to religion" given that "an overwhelming percentage of beneficiaries [were] nonparochial schools and their students." Id. [FN18] Second, the panel found that the constraints under which Chapter 2 services were provided "adequately safeguard[ed] Chapter 2 benefits from improper diversion to religious use." Id. at 1467-68. Finally, the panel

reasoned that, if the state-paid interpreter on sectarian school premises in Zobrest did not create a symbolic union between government and religion, then "certainly having religiously neutral material and equipment in the same classroom does not create a symbolic union either." Id. at 1468, citing Zobrest, 509 U.S. at 13, 113 S.Ct. 2462.

> FN18. The panel also found that, given the de minimis aid provided per student ($6.65 per student in 1988-89), "it is no surprise that Chapter 2 funds are supplementary and cannot supplant the basic educational services of the religious schools." Id.

Although it had already established (to its own satisfaction) that Meek and Wolman were no longer good law, the panel went on to distinguish the aid programs in those cases from Chapter 2:

> [T]he statutes struck down in Meek and Wolman are fundamentally different from the Chapter 2 statute at issue here. The ***371** statute in Meek was not neutral because it provided close to $12 million in aid that was targeted directly at private schools, of which more than 75% were church- related. Similarly, in Wolman, the statute was not neutral because it provided $88.8 million in aid that was targeted directly at private schools, of which 96% were church-related and 92% were Catholic. Here, seventy-four percent of Chapter 2 benefits went to public schools. Of the remaining twenty-six percent ... a substantial portion was allocated to nonreligious private schools. Indeed, over thirty percent of the private schools under the Chapter 2 program are nonreligious. Thus, unlike the statutes in Meek and Wolman, Chapter 2 is a neutral, generally applicable statute that provides benefits to all schools, of which

> the overwhelming beneficiaries are nonparochial schools.

Walker, 46 F.3d at 1468. [FN19]

> FN19. The panel also found that Chapter 2 did not violate the "entanglement" prong of Lemon, given the minimal intrusion onto the parochial schools premises by State monitors, and also given the "self-policing" nature of the neutral instructional materials and equipment. Walker, 46 F.3d at 1469, citing, inter alia, Meek, 421 U.S. at 365, 95 S.Ct. 1753, and Zobrest, 509 U.S. at 13-14.

The Walker panel decision was not without its detractors, however. While Judge Fernandez agreed with the panel majority that the distinction drawn in Meek between textbooks and educational materials was "untenable," he nevertheless believed that Meek was still binding law. See Walker, 46 F.3d at 1470 (Fernandez, J., concurring and dissenting)("[The Supreme] Court has given us the book-for-kids versus materials-for-schools dichotomy. Only it can take it away."). Additionally, the Ninth Circuit's refusal to rehear the case en banc provoked a vituperative dissent by Judge Reinhardt (joined by Judges Pregerson and Hawkins). Judge Reinhardt excoriated the panel majority for shirking its "clear duty to invalidate the San Francisco Unified School District's provision of videos, overhead projectors, televisions, record players, and similar equipment to parochial schools." Walker v. San Francisco Unified School District, 62 F.3d 300, 301 (1995)(Reinhardt, J., dissenting from denial of en banc rehearing). Judge Reinhardt repeatedly emphasized that Meek and Wolman were still binding precedent and that "[t]he distinction between textbooks and other educational materials is so clear

and well-established as to defy legitimate judicial evasion." Id.

C.

When we carefully review the Supreme Court's pronouncements in Allen, Meek, Wolman, and Regan, it is tempting to complain that the high Court has instructed us confusingly. As merely one example, the Court in Allen registered its disagreement with the proposition "that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." Allen, 392 U.S. at 248, 88 S.Ct. 1923. Only seven years later, however, the Court was heard to say in Meek that "[t]he secular education [that parochial] schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined." Meek, 421 U.S. at 366, 95 S.Ct. 1753, quoting Lemon, 403 U.S. at 657, 91 S.Ct. 2105 (opinion of Brennan, J.) (emphasis added). Lest we fall into despair, however, we will view the Court's cases dealing with state aid to religious schools more in terms of what they did rather than what they said.

When we take that approach, the solution becomes compellingly clear and simple. Meek and Wolman have squarely held that what the government is attempting to accomplish through Chapter 2, it may not do. No case has struck down Meek or Wolman. We could take out our judicial divining rod and try to predict, on the basis of what has been said since Meek and Wolman, what the present Court would do if called upon to weigh the constitutionality of Chapter 2. But such a course would, we think, take us beyond our role as a Circuit Court of Appeals, bound to follow the dictates of the Supreme Court. And if our duty

were not already clear *372 enough, the Court has recently reminded us of it in Agostini:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini, at ----, 117 S.Ct. at 2017, quoting Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)(emphasis added).

Meek invalidated a Pennsylvania statute that authorized the Secretary of Education to lend to parochial schools "instructional materials" which included "periodicals, photographs, maps, charts, sound recordings, films, ... projection equipment, recording equipment, and laboratory equipment." Meek, 421 U.S. at 354-55, 366, 95 S.Ct. 1753; see also Meek, 421 U.S. at 354 n. 4, 95 S.Ct. 1753 (complete statutory definition of "instructional materials."). Meek is directly on point and has not been overruled by any Supreme Court case. We thus "follow the case that directly controls." See Agostini, at ----, 117 S.Ct. at 2017.

In Allen, Meek, Wolman, and Regan, the Court drew a series of boundary lines between constitutional and unconstitutional state aid to parochial schools, based on the character of the aid itself. Allen approved textbook loans to parochial schools because the evidence did not indicate that "all textbooks ... are used by the parochial schools to teach religion." Allen, 392 U.S. at 248, 88 S.Ct. 1923. While

recognizing that books, if they were religious books, could have the effect of indoctrination, the Allen Court likened the purely secular books at issue there to the bus transportation subsidized in Everson v. Board of Education, 330 U.S. 1, 17, 67 S.Ct. 504, 91 L.Ed. 711 (1947): neither bus rides nor purely secular textbooks had "inherent religious significance." Allen, 392 U.S. at 244, 88 S.Ct. 1923. While Justices Black and Douglas dissented in Allen, they did so based on a different conception of the role of textbooks in parochial schools. See Allen, 392 U.S. at 252, 88 S.Ct. 1923 (Black, J., dissenting) ("Books are the most essential tool of education since they contain the resources of knowledge which the educational process is designed to exploit."), and Allen, 392 U.S. at 257, 88 S.Ct. 1923(Douglas, J., dissenting)("The textbook goes to the very heart of the education in a parochial school."). Both the majority and the dissenting opinions, however, consistently focused on the character of the aid given to parochial schools.

Meek and Wolman, while both reaffirming Allen, nevertheless invalidated state programs lending instructional materials other than textbooks to parochial schools and schoolchildren. Meek merely intimated that the character of the aid was the determinative feature in its holding. See Meek, 421 U.S. at 364, 95 S.Ct. 1753 ("[A] State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities--secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school.") (emphasis added). But Wolman clarified that, in the Court's view, the character of the aid itself determined whether the aid was constitutional. Wolman did so by upholding several different types of aid (textbooks, administration of state-required standardized tests, speech/hearing diagnostic services, off-premises therapeutic/guidance/remedial services), while at the same

time striking down, based on Meek, the loan of instructional materials to parochial schoolchildren. See Wolman, 433 U.S. at 236-38, 238-41, 241- 244, 244-248, 248-252, 97 S.Ct. 2593. The Wolman Court distinguished among these various types of aid by reference to the particular attributes of the aid itself. See, e.g., Wolman, 433 U.S. at 244, 97 S.Ct. 2593("[D]iagnostic services, unlike teaching or counseling, have little or no educational content and are not closely associated with the educational mission of the nonpublic school."). Wolman candidly recognized the "tension" existing between the holdings in Meek and Allen and sought to resolve that tension by emphasizing the *373 unique character of the aid approved in Allen, i.e., that "the educational content of textbooks is something that can be ascertained in advance and cannot be diverted to sectarian uses." See Wolman, 433 U.S. at 251 n. 18, 97 S.Ct. 2593; see also Committee for Public Education v. Nyquist, 413 U.S. 756, 781-82, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973).

Contrary to the Walker panel's view, Regan did nothing to "instruct us that the difference between textbooks and other instructional equipment and materials ... is not of constitutional significance." Walker, 46 F.3d at 1466. Regan did exactly the opposite. In seeking to harmonize the holdings of Meek and Wolman, the Regan Court merely observed that Meek did not forbid all types of aid to sectarian schools. See Regan, 444 U.S. at 661, 100 S.Ct. 840. Indeed, as the Regan Court realized, if Meek stood for such a proposition, then Wolman 's approval of, for example, the testing and grading services would have flown in the face of precedent. See id. Regan clarified that Meek only invalidates a particular kind of aid to parochial schools--the loan of instructional materials. See id. at 662, 100 S.Ct. 840.

The Walker panel made a flawed attempt to avoid the holdings of Meek and Wolman by "distinguishing" the

statutes at issue in those cases from the Chapter 2 program. The panel opined that the Meek and Wolman statutes were "fundamentally different" from Chapter 2 because they were not "neutral." Walker, 46 F.3d at 1468. By this, the panel meant that the challenged programs in Meek and Wolman directly targeted massive aid to private schools, the vast majority of which were religiously-affiliated. See id. By contrast, the panel distinguished Chapter 2 as a "neutral, generally applicable statute that provides benefits to all schools, of which the overwhelming beneficiaries are nonparochial schools." Id. But Walker misunderstood the aid programs struck down in Meek and Wolman.

Those cases dealt with general aid programs designed to provide equitable benefits to both public and nonpublic schoolchildren. See Meek, 421 U.S. at 351-52, 95 S.Ct. 1753 ("With the stated purpose of assuring that every schoolchild in the Commonwealth will equitably share in the benefits of auxiliary services, textbooks, and instructional material provided free of charge to children attending public schools, the Pennsylvania General Assembly in 1972 added Acts 194 and 195 to the Pennsylvania Public School Code of 1949.") (citations omitted)(emphasis added), and Wolman, 433 U.S. at 234, 97 S.Ct. 2593 ("All disbursements made with respect to nonpublic schools have their equivalents in disbursements for public schools, and the amount expended per pupil in nonpublic schools may not exceed the amount expended per pupil in public schools.")(emphasis added). The Meek and Wolman Courts, however, dedicated their discussion to those parts of the programs that channeled aid to nonpublic schools, because it was the character of the aid provided to those schools, and not the relative percentages of aid distributed between public and nonpublic schools, that was determinative. See Walker, 62 F.3d at 302 n. 1 (Reinhardt, J., dissenting from denial of en banc rehearing). Thus, the percentages discussed in Meek and Wolman were

completely irrelevant to the constitutionality of the programs at issue there, as was the fact that the general aid programs might have been implemented by two separate statutes. The Court observed in Meek, in a different context, that "it is of no constitutional significance whether the general program is codified in one statute or two." Meek, 421 U.S. at 360 n. 8, 95 S.Ct. 1753.

Since Walker was decided before the Supreme Court handed down Agostini, we should add that Agostini also does not overrule Meek or Wolman; nor does Agostini dismantle the distinction between textbooks and other educational materials. In fact, Agostini does not even address that issue. Agostini does, it is true, discard a premise on which Meek relied--i.e., that "[s]ubstantial aid to the educational function of [sectarian] schools ... necessarily results in aid to the sectarian school enterprise as a whole." Meek, 421 U.S. at 366, 95 S.Ct. 1753 (emphasis added). But Agostini does not replace that assumption with the opposite assumption; instead, Agostini only goes so far as to "depart[ ] from the rule ... that all government aid that directly aids the educational ***374** function of religious schools is invalid." Agostini, at ----, 117 S.Ct. at 2011 (emphasis added). Agostini holds only that the aid at issue there (i.e., the on-premises provision of special education services by state-paid teachers) was not the kind of governmental aid that impermissibly advanced religion. Id. at ----, 117 S.Ct. at 2016. Agostini says nothing about the loan of instructional materials to parochial schools and we therefore do not read it as overruling Meek or Wolman. Agostini only instructs us that Meek 's presumption regarding instructional materials should not be applied to state-paid teachers on parochial schools premises. See Agostini, at ----, 117 S.Ct. at 2012; see also Ball, 473 U.S. at 395-96, 105 S.Ct. 3216 (applying Meek and Wolman to state-paid teachers).

D.

[15] Applying Meek and Wolman, we hold that Chapter 2, 20 U.S.C. §§ 7301-7373, and its Louisiana counterpart, La.Rev.Stat.Ann. §§ 17:351- 52 (West 1982 & West Supp.1998), are unconstitutional as applied in Jefferson Parish, to the extent that either program permits the loaning of educational or instructional equipment to sectarian schools. By prohibiting the loaning of such materials, our decree encompasses such items as filmstrip projectors, overhead projectors, television sets, motion picture projectors, video cassette recorders, video camcorders, computers, printers, phonographs, slide projectors, etc. See, e.g., Meek, 421 U.S. at 354 n. 4, 95 S.Ct. 1753. Our decree also necessarily prohibits the furnishing of library books by the State, even from prescreened lists. We can see no way to distinguish library books from the "periodicals ... maps, charts, sound recordings, films, or any other[ ] printed and published materials of a similar nature" prohibited by Meek. See id. at 355, 95 S.Ct. 1753 (internal quotes omitted). The Supreme Court has only allowed the lending of free textbooks to parochial schools; the term "textbook" has generally been defined by the case law as "a book which a pupil is required to use as a text for a semester or more in a particular class he legally attends." Allen, 392 U.S. at 239 n. 1, 88 S.Ct. 1923. We do not think library books can be subsumed within that definition.

We therefore REVERSE Judge Livaudais' grant of summary judgment in favor of Defendants and RENDER judgment declaring Chapter 2, 20 U.S.C. §§ 7301-7373, and its Louisiana counterpart, La.Rev.Stat.Ann. §§ 17:351- 52, unconstitutional as applied in Jefferson Parish.

IV.

[16] Plaintiffs also challenge an agreement between the JPSB and the Jefferson Non-Public School Transportation Corporation (the "Corporation") entered into pursuant to La.Rev.Stat.Ann. § 17:158 (West 1982 & West Supp.1998), under which the JPSB makes payments to the Corporation, which in turn arranges transportation for students to six parochial schools in Jefferson Parish. Plaintiffs argue that the agreement impermissibly delegates civil authority to a group (the Corporation) dedicated to serving religious interests, in violation of the Establishment Clause, and furthermore that the agreement violates the neutrality requirements of the Establishment Clause by privileging six sectarian schools over other public and nonpublic schools. The district court, after a bench trial, disagreed, finding the arrangement constitutionally indistinguishable from the arrangement upheld in Everson v. Board of Education of Ewing, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947). See generally, Helms, 856 F.Supp. at 1133-55.

A.

Louisiana law requires that "each parish and city school board shall provide free transportation for any student attending a school of suitable grade approved by the State Board of Elementary and Secondary Education within the jurisdictional boundaries of the parish or school board if the student resides more than one mile from such school." La.Rev.Stat.Ann. § 17:158(A)(1) (West Supp.1998). A subsection of the same statute provides that "nothing ... shall prohibit a parish or city school from entering into contracts or mutual agreements for providing school bus transportation." La.Rev.Stat.Ann. § 17:158(A)(4) *375 (West Supp.1998). The JPPSS provides free transportation to eligible public and nonpublic school students. Since 1988,

nonpublic and public student bus transportation has been funded through separate appropriations of state funds. Bus drivers are paid through a combination of state funds and local supplements.

During the 1988-89 school year, funding reductions for Jefferson Parish nonpublic school transportation caused the JPSB to cut local supplements for nonpublic schools. To make up for the shortfall, the Archdiocese of New Orleans agreed to contribute funds and thereby ensure the restoration of certain Catholic, nonpublic schools' transportation services to the prior year's level. Parents of schoolchildren at those nonpublic schools were thereafter required to pay a supplement to offset transportation costs. Nevertheless, the JPSB discontinued some of the nonpublic school transportation in May 1988, because JPSB had not received all of the necessary funds from those nonpublic schools.

In 1989, the State increased nonpublic school transportation funding to Jefferson Parish by $278,788, for a total of $1,490,637. The Archdiocese of New Orleans and the State decided that part of these additional funds would be used to provide privately contracted bus service for those students who had been eliminated from the transportation plan. Consequently, the Jefferson Non- Public School Transportation Corporation was formed on September 28, 1989. The stated purposes of this non-profit Corporation included

> [the provision of] transportation for the children of parents residing in the Parish of Jefferson who have enrolled their children in parochial schools within the Parish of Jefferson other than their own church parish because of the fact that the parish in which said parents reside does not operate a parochial school....

Helms, 856 F.Supp. at 1149. The Corporation had members from six nonpublic schools: St. Christopher, St. Catherine of Siena, St. Louis King of France, St. Agnes, St. Angela Merici, and St. Matthew the Apostle.

On February 6, 1990, JPSB paid the Corporation $100,195 "in lieu of transportation services previously provided by the [JPPSS] for some of the students attending [the six Catholic schools]." Id. The Corporation paid the funds to "privately contracted bus drivers" who provided bus services to 368 students attending the six schools. Id. at 1149-50. The district court specifically found that "the funds paid to the [Corporation] were clearly spent for transportation of nonpublic school students." Id. at 1150.

B.

We agree with the district court that the agreement between the JPSB and the Corporation to provide funds for the transportation of nonpublic school children does not violate the Establishment Clause. See Helms, 856 F.Supp. at 1150-55. The allocation of funds to the Corporation is simply one part of a broader, general program by which the State and Jefferson Parish provide a secular, noninstructional service to sectarian and nonsectarian schoolchildren alike.

The Supreme Court's decisions in Everson and Wolman furnish the guideposts for our discussion, although, as we make clear below, the Jefferson Parish program we confront here falls somewhat between the facts of those cases. In Everson, the Court approved a New Jersey program by which the State reimbursed parents for the cost of sending their children to and from school, whether public or parochial. Everson, 330 U.S. at 17, 67 S.Ct. 504. The Court analogized the reimbursement to situations "where the state requires a local transit company to provide reduced fares to

school children including those attending parochial schools," or where "state-paid policemen ... protect children going to and from church schools." Id. Such services, in the Court's view, were "separate and ... indisputably marked off from the [schools'] religious function." Id. at 18, 67 S.Ct. 504. Wolman restated the holding in Everson in the following way:

> The critical factors . . . are that the school has no control over the expenditure of the funds and the effect of the expenditure is unrelated to the content of the education provided. Thus, the bus fare program in *376 Everson passed constitutional muster because the school did not determine how often the pupil traveled between home and school--every child must make one round trip every day--and because the travel was unrelated to any aspect of the curriculum.

Wolman, 433 U.S. at 253, 97 S.Ct. 2593.

Wolman, by contrast, invalidated an Ohio statute which authorized the State to expend funds to provide "field trip transportation" to nonpublic school students on an equal basis with public school students. The Court pointed out that in Wolman, unlike Everson, the nonpublic school controlled "the timing of the trips and, within a certain range, their frequency and destinations." Id. Additionally, the Court believed that "field trips," given the inevitable discussion accompanying them and the parochial schoolteacher's input and guidance, "are an integral part of the educational experience." Id. at 253-54, 97 S.Ct. 2593.

The Jefferson Parish program falls somewhere in the gray area between Everson and Wolman. Certainly the content of the aid provided through the JPSB-Corporation agreement is for our purposes identical to the aid provided in Everson:

getting a child to and from school once a day. There is no evidence, as the District Court found, that the funds were used for anything other than such transportation. See Helms, 856 F.Supp. at 1150. The means by which the aid was administered, however, bear a vague resemblance to Wolman. The funds are paid, not as reimbursements to parents, but instead as a subsidy for transportation costs to a private, non-profit corporation, whose "members" were parents of children attending the six schools at issue. [FN20] This system is at least superficially similar to the direct payments, over which the nonpublic schools had virtually unfettered discretion, condemned in Wolman. See Wolman, 433 U.S. at 253-54, 97 S.Ct. 2593.

> FN20. In rejecting the Plaintiffs' Motion for Reconsideration of Judge Heebe's ruling on the transportation issue, Judge Livaudais found that the Corporation was "non-religious and was set up exclusively to hire bus drivers to drive these children to and from school . . ."

Although again we must perform a balancing act between permissible and impermissible aid to sectarian institutions, we find that the arrangement at issue here bears more of a resemblance to the program upheld in Everson than to the one struck down in Wolman. The primary consideration guiding us is the character of the aid provided. Here, as in Everson, the payments are earmarked for a wholly secular function lacking in any educational content whatsoever--the transportation of schoolchildren to and from school. There is no danger, as there was in Wolman, that parochial teachers will subvert the state-funded process to further their own sectarian aims; indeed, the religious teachers have no role in this kind of transportation, and, as the District Court assured us, "[t]here has been no evidence presented that JPPSS bus

drivers might impart religious beliefs to their bus passengers." Helms, 856 F.Supp. at 1151.

Although the means through which the aid gets to religious institutions--the Corporation--did give us pause initially, in the end we believe that the Corporation serves merely an administrative function in the aid process. The Corporation acts as a conduit through which the funds pass and is administered by the parents of schoolchildren. The Supreme Court has already approved direct reimbursements to parents in Everson; it would exalt form over substance to draw a constitutional distinction where the funds are paid, not to the parents themselves, but to a private corporation with the same parents as members. Furthermore, we have seen no evidence indicating that the Corporation exercises unfettered discretion over the funds. Instead, as both district judges who considered the issue concluded, the Corporation is dedicated exclusively to facilitating secular transportation services for its members' students and has no religious objectives at all. Finally, no evidence indicates that the funds were used for anything but the permissible purpose of providing transportation services to nonpublic schoolchildren. See Helms, 856 F.Supp. at 1150.

We also reject Plaintiffs' argument that the transportation payments violate the neutrality requirements of the Establishment Clause because the Corporation is dedicated *377 to serving only six nonpublic schools. This contention overlooks the fact that the Corporation focused on the six schools at issue because they had been excluded from local funding due to cuts in transportation funds from the state. Thus, the Corporation exists, not to privilege these six parochial schools, but instead to bring them to a level of services equal to other schools. Finally, the eligibility requirements for transportation aid are generally applicable to all students, both public and nonpublic. Any differences

among the level of services provided from school to school (e.g., frequency and pattern of busing routes, local supplement levels, etc.) arise from administrative concerns that have nothing to do with religion. Indeed, as the district court, found, although the State strives to make transportation services available equitably to both public and nonpublic students, "it appears . . . that greater benefits are provided to the public school students." Helms, 856 F.Supp. at 1152. We cannot understand how the Plaintiffs then complain that the transportation payment scheme operates to the unfair benefit of the six Catholic schools at issue here.

Based on Everson and Wolman, we AFFIRM the District Court's determination that the transportation payments to the Corporation, by virtue of La.Rev.Stat.Ann. § 17:158, are constitutional.

V.

In sum, then,(1) we REVERSE the district court's decision in favor of Plaintiffs and RENDER judgment in favor of Defendants declaring the Louisiana special education program, La.Rev.Stat.Ann. § 17:1941-1956, constitutional as applied in Jefferson Parish; (2) we REVERSE the district court's grant of summary judgment in favor of Defendants and RENDER judgment in favor of Plaintiffs declaring that the Federal instructional materials program, 20 U.S.C. §§ 7301-7373, and its Louisiana counterpart, La.Rev.Stat.Ann. §§ 17:351-52 are unconstitutional as applied in Jefferson Parish; and, (3) we AFFIRM the district court's decision in favor of Defendants that the transportation payments to the Jefferson Non-Public School Transportation Corporation, by virtue of La.Rev.Stat.Ann. § 17:158, are constitutional.

AFFIRMED in part; REVERSED in part and JUDGMENT RENDERED.

OTHER RELEVANT OPINIONS AND ORDERS

Not Reported in F.Supp.
(Cite as: 1997 WL 35283 (E.D.La.))

Mary L. HELMS, et al.
v.
Wilmer CODY, et al.
Mary L. HELMS, individually and as next friend of AMY T. HELMS, a minor; et al., Plaintiffs,
v.
Cecil PICARD, as Louisiana State Superintendent of Instruction; et al.,
Defendants,
Guy Mitchell, et al., Intervenors.

CIV.A. No. 85-5533.

United States District Court, E.D. Louisiana.

Jan. 28, 1997.

ORDER AND REASONS

LIVAUDAIS, District Judge.

*1 This cause came on for hearing on various days on post-judgment motions including:

1. Motion of the Federal Defendants, Richard W. Riley as Secretary of the United States Department of Education, and the United States Department of Education, for Reconsideration of this Court's Ruling on the Chapter 2

Program as Administered in Jefferson Parish, Louisiana (Doc. 353);

2. Motion of Intervenors, Guy Mitchell, Jan Mitchell, Earline Castillon, Eugene Cerise, and Kathy Cerise, for Reconsideration of the Court's March 1990 Summary Judgment Order on the Chapter 2 Program and the Louisiana State School Books and Materials Program, as Applied in Jefferson Parish, Louisiana (Doc. 367);

3. Motion of Federal Defendants, Richard W. Riley as Secretary of the United States Department of Education, and the United States Department of Education, to Alter or Amend this Court's Judgment of July 25, 1994, in which this Court declared unconstitutional and enjoined portions of the federal Chapter 2 program as administered in Jefferson Parish, Louisiana (Doc. 379);

4. Motion of Intervenors, Guy Mitchell, Jan Mitchell, Earline Castillon, Eugene Cerise, and Kathy Cerise, to Alter or Amend the Court's Judgment of July 25, 1994, with respect to Chapter 2 and the Louisiana state books and materials program (Doc. 380);

5. Motion of Federal Defendants, Richard W. Riley as Secretary of the United States Department of Education, and the United States Department of Education, to Stay the Judgment Entered by this Court on July 25, 1994 (Doc. 381);

6. Motion of State Defendants, Cecil J. Picard as Louisiana Superintendent of Public Instruction, Kenneth Duncan as Louisiana State Treasurer, and the Louisiana State Board of Elementary and Secondary Education, to Partially Stay the Judgment Entered on July 25, 1994, with respect to the unconstitutionality of the Chapter 2 program in Jefferson Parish (Doc. 384);

7. Amended Motion of State Defendants, Cecil J. Picard as Louisiana Superintendent of Public Instruction, Kenneth Duncan as Louisiana State Treasurer, and the Louisiana State Board of Elementary and Secondary Education, for Partial Stay of the Judgment Entered on July 25, 1994, with respect to the unconstitutionality of the Chapter 2 program and La.R.S. 17:351-52 in Jefferson Parish (Doc. 392);

8. Motion of Intervenors, Guy Mitchell, Jan Mitchell, Earline Castillon, Eugene Cerise, and Kathy Cerise, for Partial Stay of the Implementation of the Court's July 25, 1994 Judgment with Respect to Chapter 2, the Louisiana State Books and Materials Program (Doc. 394);

9. Motion of Plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, to Alter or Amend the Judgment regarding the School Bus Transportation Program (Doc. 388); and

10. Motion of the State Defendants, Cecil J. Picard as Louisiana Superintendent of Public Instruction, Kenneth Duncan as Louisiana State Treasurer, and the Louisiana State Board of Elementary and Secondary Education, for Leave of Court to Adopt Amendment to the Regulations Governing Reimbursement for Required Services (Doc. 455).

***2** This civil action was assigned to Judge Frederick J. R. Heebe, who entered summary judgment rulings, conducted the non-jury trial, issued Findings and Conclusions and Judgment on all issues presented in the complaint, and took under submission the various post-trial motions. Upon Judge Heebe's retirement, this action was re-allotted to this section of the Court for consideration. The Court, having heard the arguments of counsel and having studied the legal

memoranda submitted by the parties, is now fully advised in the premises and ready to rule.

REASONS

Motions relating to Chapter 2 and Louisiana School Books Programs

On March 27, 1990, the previous court granted the motion of plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, for summary judgment, holding that Chapter 2 of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 2701-3341 [FN1], and the Louisiana equipment and materials statute, La.Rev.Stat. §§ 17:351-54, are unconstitutional. Doc. 220. The previous court applied the three part test set forth in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1976), to determine whether government aid to private schools is constitutional. It found (1) that the primary beneficiaries of the aid are nonpublic schools; (2) that the majority of the schools receiving the aid are pervasively sectarian; and (3) that the aid has the impermissible effect of advancing religion. Doc. 220.

> FN1. This Act was amended, renumbered, reorganized, and expanded by Public Law 103-382, October 20, 1994. It has now been moved to 20 U.S.C. §§ 7301-7373.

The parties have now requested several remedies concerning the Chapter 2 ruling:

1. Both federal defendants and intervenors have filed motions asking that the court reconsider its 1990 summary judgment order.

2. Both federal defendants and intervenors have filed motions to alter or amend the Judgment of July 25, 1994 with respect to Chapter 2 and the Louisiana State Books and Materials Program.

3. The federal defendants, the state defendants, and the intervenors ask for a stay pending final disposition of any appeals to the Fifth Circuit Court of Appeals. Plaintiffs oppose all of the motions for a stay of the July 25, 1994 judgment as it concerns the Chapter 2 program.

"Chapter 2" refers to Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965. On October 20, 1994, Congress enacted the Improving America's Schools Act of 1994, Pub.L. 103-382, 108 Stat. 3518. Former Chapter 2 is now labelled "Subchapter VI - Innovative Education Program Strategies" and is codified at 20 U.S.C. §§ 7301-7373. However, for ease of reference, this Court will continue to refer to the new Subchapter VI as "Chapter 2."

Chapter 2 provides financial assistance to state educational agencies ("SEAs") and local educational agencies ("LEAs") to implement eight "innovative assistance" programs. 20 U.S.C. §§ 7351(a) & (b). The innovative assistance programs are:

> (1) technology related to the implementation of school-based reform programs, including professional development to assist teachers and other school officials regarding how to use effectively such equipment and software;
>
> *3 (2) programs for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials,

computer software and hardware for instructional use, and other curricular materials which are tied to high academic standards and which will be used to improve student achievement and which are part of an overall education reform program;

(3) promising education reform projects, including effective schools and magnet schools;

(4) programs to improve the higher order thinking skills of disadvantaged elementary and secondary school students and to prevent students from dropping out of school;

(5) programs to combat illiteracy in the student and adult population, including parent illiteracy;

(6) programs to provide for the educational needs of gifted and talented children;

(7) school reform activities that are consistent with the Goals 2000: Educate America Act; and

(8) school improvement programs or activities under sections 6317 and 6318 of this title.

20 U.S.C. § 7351(b).

Plaintiffs' challenge in this case is limited to the innovative assistance program under 20 U.S.C. § 7351(b)(2) in Jefferson Parish, Louisiana.

Chapter 2 services are to be provided to children enrolled in both public and private nonprofit schools. 20 U.S.C. §§ 7312, 7372. 20 U.S.C. § 7372 provides for the participation

of children enrolled in private nonprofit elementary and secondary schools. § 7372(a)(1) states:

> To the extent consistent with the number of children in the school district of a local educational agency which is eligible to receive funds under this subchapter or which serves the area in which a program or project assisted under this subchapter is located who are enrolled in private nonprofit elementary and secondary schools, or with respect to instructional or personnel training programs funded by the State educational agency from funds made available for State use, such agency, after consultation with appropriate private school officials, shall provide for the benefit of such children in such schools secular, neutral, and nonideological services, materials, and equipment, including the participation of the teachers of such children (and other educational personnel serving such children) in training programs, and the repair, minor remodeling, or construction of public facilities as may be necessary for their provision ... , or, if such services, materials, and equipment are not feasible or necessary in one or more such private schools as determined by the local educational agency after consultation with the appropriate private school officials, shall provide such other arrangements as will assure equitable participation of such children in the purposes and benefits of this subchapter.

(Emphasis added).

Chapter 2 funds for the innovative assistance programs must supplement, and in no case supplant, the level of funds that, in the absence of Chapter 2 funds, would be made available

for those programs from "non-Federal sources." 20 U.S.C. § 7371(b).

*4 Chapter 2 also requires that the control of all Chapter 2 funds "and title to materials, equipment, and property ... shall be in a public agency ... and a public agency shall administer such funds and property." 20 U.S.C. § 7372(c)(1). In addition, any services provided for the benefit of private school students must be provided by "a public agency" or by a contractor who "is independent of such private school and of any religious organizations." 20 U.S.C. § 7372(c)(2).

Pursuant to Louisiana law, the Louisiana Superintendent of Public Instruction, defendant, Cecil J. Picard, is the designated SEA for Louisiana. See State of Louisiana Chapter 2 Guidelines, June 1989 at 1 [Fed. Ex. D-4]. The State Bureau of Consolidated Educational Programs, which was headed by Dan K. Lewis, Ph.D. at the time of trial, administers the Louisiana Chapter 2 Program. Once Louisiana receives its Chapter 2 funds from the federal government, the SEA allocates 80 percent of the funds to LEAs. Id. at 2-3. Eighty-five percent of those funds are earmarked for LEAs based on the number of participating elementary and secondary school students in both public and nonprofit, private schools and 15% based on the number of children from low-income families. Id. at 3.

Dr. Lewis stated in his deposition that about 25% of the Chapter 2 funds are allocated to the nonpublic school sector. Lewis Dep., p. 15. For the fiscal year 1984-85, Jefferson Parish received $655,671 in Chapter 2 funds. Lewis Ex. 2, pp. 99-100. Of this $655,671, $456,097 went to the public schools and $199,574 went to the nonpublic schools. Id. This amounts to 70% of the Chapter 2 funds being allotted to the public schools and 30% being allotted to the nonpublic schools, including both private and religious schools.

Dr. Lewis stated that the LEAs are told that "for every dollar you spend for the public school student, you spend the same dollar for the non-public school student." Lewis Dep., p. 77. He declared that the Louisiana Department of Education "never transmit[s] dollars to the non-public school." Id. at 87.

Dr. Lewis testified that any equipment bought for the nonpublic schools with Chapter 2 funds is on loan to the nonpublic schools. Id. at 99. Because the nonpublic schools do not own the equipment, the ultimate authority always rests with the public school system, not the nonpublic schools. Id. at 99-100.

In 1984, the State instituted a monitoring process to insure that the Chapter 2 books and equipment were not being used for religious purposes. Lewis Dep., pp. 102 & 142. Dr. Lewis stated that the LEAs are encouraged to get the nonpublic schools to sign a set of assurances that they won't use the equipment for religious purposes, but the nonpublic schools are not required to sign. Id. at 102-03. In addition, the LEAs make monitoring visits to the nonpublic schools, and the state makes monitoring visits to the LEAs and to some of the nonpublic schools. Id. at 103.

*5 The United States Department of Education conducted an on-site visit to review the Louisiana Chapter 2 program on September 25-26, 1984. In their "Summary of Findings and Recommendations" as a result of their on-site assessment, the United States Department of Education stated as follows concerning "Monitoring LEAs":

> Section 564(a)(1) of the statute provides that the State agency is responsible for the administration and supervision of programs assisted under this Chapter.

> Congress, in enacting the technical amendments to Chapter 2, identified technical and advisory assistance and monitoring compliance as functions of an SEA's administrative and supervisory responsibilities.
>
> We understand that there are 75 LEAs and that the SEA has developed a schedule for monitoring one third of the LEAs in each of the next three years. We suggest, if at all possible, the State increase the number of visits each year. This will lessen the possibility of audit findings of noncompliance and enable the SEA to provide technical assistance to correct problems on a timely basis.

Lewis Ex. 11.

In response to the on-site assessment by the United States Department of Education, the Louisiana Department of Education made changes in monitoring the LEAs. They increased the number of on-site visits by the Chapter 2 staff to the LEAs from once every three years to once every two years. This increase in visits was to "enable more thorough, technical assistance, and the ability to correct any problems in a timely fashion." Lewis Ex. 11. In addition, in regards to private school participation in LEA Chapter 2 programs:

> [t]he State has implemented a monitoring process that includes monitoring of the private sector. The monitoring process also includes a review of the LEA's monitoring process of the private schools. These two processes will enhance the compliance area to ensure that all equipment is used for secular, neutral, and nonideological purposes.

Lewis Ex. 11

In Louisiana, LEAs have the primary responsibility for monitoring the Chapter 2 program for compliance with federal statutory and regulatory requirements and for compliance with state guidelines.

A report entitled "Louisiana Chapter 2 Evaluation Summative Evaluation Report 1985," (Lewis Ex. 2) was written by the Bureau of Evaluation, and was submitted to Dr. Lewis in March of 1985. This report provides under the heading "Nonpublic School Participation in Chapter 2":

> Although the LEAs handle most of the administrative matters related to Chapter 2, the nonpublic schools make the decisions about how to spend their Chapter 2 allocations, and they do so independently of one another. Among Catholic parochial schools, however, some dioceses appoint coordinators to centralize planning and management efforts. This collective activity is more of a confederation than a school system.
>
> Funds used by nonpublic schools are almost entirely for non-recurring expenses, usually materials and equipment, and only occasionally are for such purposes as participating in LEA-sponsored staff development activities and securing consultants. Virtually all of the Chapter 2 funds used by nonpublic schools are expended under Subchapter B, the "school improvement" section of Chapter 2. Except that funds cannot be spent for support of religious or ideological instruction, flexibility in the use of Chapter 2 funds puts a minimum of limitations on the kinds of expenditures allowed.

*6 Lewis Ex. 2, p. 28.

During the 1986-87 fiscal year, the total amount of Chapter 2 funds budgeted for nonpublic schools was $214,080.49, and the total amount budgeted for public schools was $447,067.45. Of the total of $214,080.49 in Chapter 2 funds budgeted for nonpublic schools, $94,758.15 was spent to provide library/media materials; $102,862.00 was spent for instructional equipment; and $16,460.34 was spent for local improvement programs.

Dan K. Lewis, who administers the Chapter 2 program for the state, was questioned extensively at his deposition about how the nonpublic schools' use of Chapter 2 instructional material and equipment was monitored. Lewis Dep. I. Dr. Lewis testified that he, along with Mr. Charles R. Jarreau and Mr. Ed Griffin, conducted a "monitoring visit" to Jefferson Parish on April 18, 1985. Lewis Ex. 6. An ECIA Chapter 2 Monitoring Form I was submitted to the Superintendent of the Jefferson Parish Public School System based on the visit by the monitors, Dr. Lewis, Mr. Jarreau, and Mr. Griffin. Id. The monitors found that "the services, materials, equipment, or other benefits provided to nonpublic schools" were not "secular, neutral and non-ideological." Id. They also commented that "[i]n the future, caution should be taken to ensure that books and materials purchased are secular, neutral and non-ideological." Id.

Ruth Woodward, the Coordinator of the Chapter 2 program in Jefferson Parish, advised Dr. Carolyn C. Weddle, Assistant Superintendent for Instructional Programs, about the monitoring visit conducted by the Louisiana Department of Education. She explained an incident which resulted in the negative finding by Dr. Lewis and his team concerning "secular, neutral, and non-ideological" assistance provided to the nonpublic schools as follows:

> St. Rosalie's library print-out showed [that] a copy of [the book] Biography of the Saints was purchased with Chapter II funds. However, St. Rosalie contacted my office Friday to correct that entry on their library print-out. No Chapter II funds were used to purchase above, and my official response to Dr. Lewis will state same.

Lewis Ex. 11.

According to Ruth Woodward, library books are only ordered for nonpublic schools, not public schools. Woodward Dep., p. 73. The library books are stamped with "ECIA, Chapter 2." Id. at 75. After reviewing the book orders from 1982, Ms. Woodward discovered approximately 191 books were in violation of the Chapter 2 guidelines. Id. at 74. Those books were recalled and were donated to the Jefferson Parish Public Library. Id. at 75.

Ms. Woodward reviews each of the titles of the books and other materials that are received by her office from the nonpublic schools. Id. at 88. If she finds a title to be inappropriate, she deletes the title from the list and selects a title from the substitute list. Id. at 90.

In addition to library books, computers, slide and movie projectors, and overhead projectors are purchased through the program. Id. at 92. During her monitoring visits to the schools, she has "normally" found that the materials and equipment are used in accordance with Chapter 2 guidelines. Id. at 101. Ms. Woodward stated in her deposition that she normally has "a single visit" to a nonpublic school during the school year. Id. at 118.

*7 Ms. Woodward stated that none of the Chapter 2 money is given directly to either the public or nonpublic schools in

the form of cash or a check. Id. at 207. The funds are retained and administered by her office. Id.

On March 27, 1990, the prior court granted partial summary judgment and struck down portions of the federal Chapter 2 program and the Louisiana state books and materials program authorized pursuant to La.Rev.Stat. §§ 17:351-52, as administered in Jefferson Parish, Louisiana. (Doc. 220). The use of federal funds to provide instructional equipment (including computer and audio-visual equipment), educational materials, library books, and supplies to pervasively sectarian schools under Chapter 2 was held unconstitutional and lending of such items enjoined. Id.

Attention was specifically focused on 20 U.S.C. § 7372(a)(1) [FN2] which permits the furnishing of Chapter 2 materials and equipment to nonpublic schools. The "services, materials, and equipment" provided under Chapter 2 for the benefit of the nonpublic schools must be "secular, neutral, and nonideological." 20 U.S.C. § 7372(a)(1). It was noted that "[t]he nonpublic schools in Jefferson Parish have participated primarily in the instructional resources program whereby large quantities of instructional equipment (such as slide projectors, movie projectors, overhead projectors, television sets, tape recorders, projection screens, maps, globes, filmstrips, cassettes, computers, as well as library books and resource materials) are purchased with Chapter 2 funds and transferred to nonpublic school sites."

> FN2. At the time of the Court's 1990 ruling, this section was codified at 20 U.S.C. § 2972(a)(1). For ease of reference, the Court will now cite to the new United States Code sections.

The Jefferson Parish Chapter 2 program was held unconstitutional on three grounds:

> First, the primary beneficiaries of the aid are nonpublic schools; second, the majority of the schools receiving the aid are pervasively sectarian; and third, the aid has the impermissible effect of advancing religion.

Order and Reasons, (Doc. 220, p. 15).

Federal defendants and intervenors argue that the holding should be reconsidered for two main reasons. First, they claim that a major premise of the decision, i.e., that "the primary beneficiaries" of Chapter 2 "are nonpublic schools," is simply incorrect. Benefits are provided under this program for use by all schoolchildren in Jefferson Parish, both public and nonpublic, and the majority of the beneficiaries are public school children.

Second, federal defendants state that the other primary basis of the 1990 Chapter 2 Order - that the Jefferson Parish Chapter 2 program is automatically unconstitutional when Chapter 2 benefits are used at schools deemed to be "pervasively sectarian" - has been specifically and repeatedly rejected by the Supreme Court.

Federal defendants argue that the Supreme Court has never held that an educational aid program impermissibly advanced religion when the program was a neutral, general program designed to apply equally to both public and nonpublic school children, with the primary beneficiaries being public school children, as is Chapter 2. Federal defendants contend that the Supreme Court has only found improper "advancement" of religion in some of the cases when the program singled out school children in nonpublic or pervasively sectarian schools as its "primary beneficiaries." Federal defendants maintain that the Chapter

2 program does not so single out nonpublic school children and is constitutionally valid.

*8 Federal defendants argue that this decision was the first to invalidate any aspect or application of the nationwide Chapter 2 program, which has been in place, in its present form or in various predecessor statutes, for nearly 30 years. In an opinion issued after the 1990 Chapter 2 Order, the Ninth Circuit Court of Appeals addressed the constitutionality of Chapter 2, and upheld the Chapter 2 program. Walker v. San Francisco Unified School District, 46 F.3d 1449 (9th Cir. 1995), reh'g and reh'g en banc denied, 62 F.3d 300 (9th Cir. 1995). No petition for certiorari was filed in Walker.

The Walker court noted that "approximately seventy-four percent of the Chapter 2 benefits went to public schools and twenty-six percent went to private schools." 46 F.3d at 1464.

Federal defendants and intervenors claim that the Walker court's analysis is consistent with the prior court's analysis in its post-trial opinion, in which it found that public school students are the primary beneficiaries of funding under Chapter 1. Federal defendants and intervenors argue that the post-trial analysis on this issue is correct and should be applied to Chapter 2.

Federal defendants and intervenors claim that in its post-trial opinion, the previous court rejected Establishment Clause challenges to Chapter 1 and the school bus transportation program, on the grounds that the primary beneficiaries of those programs are not nonpublic schools. Rather the "primary beneficiaries" are either students at public schools, who constitute the majority of students receiving Chapter 1 benefits, or all school children or their parents who receive the benefits of the school bus transportation program.

Federal defendants and intervenors argue that the federal Chapter 2 program, as well as the state school books and materials program, are also neutral, general benefit programs, and so the earlier ruling on Chapter 2 should be vacated.

Plaintiffs oppose the motions of federal defendants and intervenors and cite to the relevant Supreme Court cases.

In Meek v. Pittenger, 421 U.S. 349, 364 (1975), the Supreme Court invalidated a materials and equipment program which was specifically and intentionally directed only to nonpublic schools, the majority of which were found to be religious.

In Wolman v. Walter, 433 U.S. 229, 248-51 (1977), the Supreme Court invalidated a program authorizing the loan of instructional equipment and materials to the parents of nonpublic school students only.

In Mueller v. Allen, 463 U.S. 388 (1983), the Supreme Court upheld a Minnesota statute that allowed a tax deduction for all state taxpayers, including parents of children attending religiously-affiliated private schools, for education-related expenses such as tuition, textbooks, and transportation.

However, in Mueller, the Court found significant the fact that the "public funds . . . become available only as a result of numerous private choices of individual parents of school-aged children." Id. at399.

*9 In Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986), the Supreme Court held that provision of aid under a state vocational rehabilitation program to a student attending a private Christian college for the purpose of pursuing a religiously-based career would not,

in violation of the Establishment Clause, have the primary effect of advancing religion.

Plaintiffs point out that in Witters it was the individual blind student who made the decision completely independent from any sectarian institution with regard to where his grant money would be spent. The sectarian institution, therefore, had no part in the planning of the program or the decision concerning who would receive the benefit. The Court in Witters noted that "the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the state," citing School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 394 (1985).

The primary argument of the federal defendants is that aid to nonpublic schools in the form of loans of educational equipment, such as computers, overhead projectors, videos, duplicating machines, and the like, is constitutional as long as the authorizing legislation provides for such loans and grants to both public and nonpublic schools. According to defendants, the constitutionality of such a program is dependent on a single factor - the breadth of the class of recipients.

Plaintiffs rely on Bowen v. Kendrick, 487 U.S. 589 (1988), in which the Court observed that "even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion." Id. at 609. The Court stated that "[o]ne way in which direct government aid might have that effect is if the aid flows to institutions that are 'pervasively sectarian.'" Id. at 610. The Court, however, concluded that "nothing on the face of the AFLA indicates that a significant proportion of the federal funds will be disbursed to

'pervasively sectarian' institutions." Id. The Court did not suggest all or most, but only a "significant proportion" need flow to pervasively sectarian institutions for the program to be constitutionally flawed.

Plaintiffs contend that Chapter 2 is unconstitutional as applied in Jefferson Parish for two main reasons: 1) Much of the Chapter 2 equipment and materials provided to sectarian schools in Louisiana is easily divertible to religious activities; and 2) Like the Ohio statute in Wolman, it provides equipment directly for the sectarian schools, not the individuals.

Plaintiffs contend that Wolman "trashed" the argument that Meek and Wolman stand for the proposition that gifts magically take on a constitutional character if a single neutral statutory provision includes both public and nonpublic elementary and secondary schools as recipients.

*10 Both defendants and plaintiffs rely on Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, 113 S.Ct. 2462 (1993). In Zobrest, the Supreme Court held that the Establishment Clause did not prohibit a public school district from providing a sign language interpreter at state expense in a Catholic school. The Court noted that "[d]isabled children, not sectarian schools, are the primary beneficiaries" of the program. Id. at 12, 113 S.Ct. at 2469.

The Zobrest Court noted that "we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit." Id. at 8, 113 S.Ct. at 2466.

The Zobrest court made a sharp distinction between direct and indirect aid to pervasively sectarian institutions. The Court found that the aid provided to James Zobrest was indirect, as distinguished from the direct subsidy through the providing of teaching material and equipment in Meek and the providing of teachers and instructional equipment and materials in Ball. Id. at 12, 113 S.Ct. at 2468-69.

The Zobrest Court quoted from Witters and Ball: "[T]he State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State." Id. at 12, 113 S.Ct. at 2468.

Plaintiffs argue that to determine whether the program of furnishing instructional equipment, materials, and supplies to parochial schools in Jefferson Parish more closely resembles the programs struck down in Meek and Ball or the programs upheld in Mueller and Witters, this Court needs to determine the substantive impact of the aid, that is, whether the aid is truly to the individual student or rather directly to the school. If the aid is truly to the individual student, plaintiffs argue that the aid should be upheld. However, if the aid is directly to the nonpublic school, then the aid should be ruled unconstitutional.

Federal defendants contend that the rulings on the Chapter 2 summary judgment motion and the Chapter 1 post-trial findings and conclusions have not been consistent. Federal defendants state that there is no difference between the Chapter 1 and the Chapter 2 programs as to who are the primary beneficiaries. Thus, federal defendants argue that since Chapter 1 was found constitutional on its face, then Chapter 2 should also be upheld.

Plaintiffs disagree and argue that the rulings have been consistent. The Chapter 2 program struck down by the previous court concerned "nonpublic schools receiv[ing] an allotment [of funds] which allows them to order instructional materials and equipment, including library books." (Doc. 220, p. 4). Thus plaintiffs contend that it was found that the aid flowed directly to the nonpublic schools.

*11 The ruling as to the Chapter 1 capital expense statute related to "funds to pay the costs of maintaining Chapter 1 services off of the premises of parochial schools at 'neutral sites.'" (Doc. 337, p. 142). The decision provides that "[u]nder § 2727(d)(A), the Secretary distributes the appropriate [Chapter 1 capital expense] funds to each state according to a statutory formula. Local Educational Agencies (LEAs) apply to the State Educational Agencies (SEAs) to receive the funds, and the SEAs distribute the funds to LEAs on the basis of need, according to criteria the SEAs have established." Id. at 144.

Plaintiffs contend that there is no conflict between the summary judgment ruling on Chapter 2 and the post-trial findings and conclusions regarding the Chapter 1 capital expense provision. Plaintiffs argue that the decision concluded that Chapter 2 directly benefitted pervasively sectarian schools, while under the Chapter 1 capital expense statute, no tax-derived funds ever reached nonpublic schools. Chapter 1 only benefitted students who received remedial services rendered by public employees outside of parochial school facilities.

In fact, plaintiffs maintain that the findings and conclusions suggested that the Chapter 1 capital expense statute had only the indirect effect of aiding sectarian schools and concluded "that [this] indirect effect does not render the government aid

[provided by Chapter 1] unconstitutional." (Doc. 337, p. 154).

Plaintiffs argue that Walker v. San Francisco Unified School Dist., 46 F.3d 1449 (9th Cir. 1995), which ruled that Chapter 2 is constitutional, is distinguishable from the instant case. Plaintiffs state that there are significant differences in the Chapter 2 program as administered in Jefferson Parish and the Chapter 2 program administered in the San Francisco Unified School District.

Plaintiffs contend that the items provided in Louisiana under the Chapter 2 program are easily diverted to religious purposes. The items provided in Louisiana include maps, globes, laboratory equipment, tape recorders, projectors, and other audio-visual equipment. In San Francisco, the Chapter 2 materials were confined to prescreened textbooks, instructional materials, and "locked" computer hardware and software that could not be diverted to religious use.

Plaintiffs submit that because the instructional equipment and materials are so easily divertible, there is basically no constitutionally permissible monitoring scheme available to prevent constitutional violations. Plaintiffs argue that the evidence in this case demonstrates that audio-visual equipment, such as overhead projectors, VCRs, etc., which are usable equally in religion and science classes and are thus easily divertible, cannot be effectively monitored. In the case of Jefferson Parish, unlike Walker, plaintiffs claim that the evidence shows that such equipment has actually been used in classes teaching religion. Thus, plaintiffs state that the effectiveness of any so- called monitoring conducted by the officials charged with such responsibilities has proven to be ineffective.

***12** The prior court observed in its March 27, 1990 Order that the program found unconstitutional in Meek involved just under $12 million of direct aid to predominantly church-related nonpublic schools in Pennsylvania through the loan of instructional materials and equipment. It concluded that this amounted to approximately $9,090 per school and that the Meek court firmly determined that this aid was "neither indirect nor incidental." (Doc. 220, p. 13). The evidence in this case indicates that for fiscal year 1985, a total of $207,648 was allocated under Chapter 2 for the 41 participating nonpublic schools in Jefferson Parish. This comes to $5,064 for each participating school. In addition, another $649,344 was allocated to the 56 participating nonpublic schools in Jefferson Parish under the state program providing free books, materials, and supplies. This comes to another $11,595 per participating school. Plaintiffs maintain that the Chapter 2 program administered in Jefferson Parish involves a significant number of pervasively sectarian schools and provides substantial direct aid to pervasively sectarian elementary and secondary schools and thus is violative of the Establishment Clause.

In its 1990 Chapter 2 Order, the prior court focused on the Chapter 2 program and did not undertake a detailed analysis of the Louisiana statutes, La.Rev.Stat.Ann. §§ 17:351-352, which authorize the provision of school books and instructional materials to students at public and nonpublic schools, or the implementation of that program in Jefferson Parish. Plaintiffs have not challenged the provision of textbooks pursuant to the statute. An overwhelming portion of the funds are used to purchase textbooks.

Intervenors note that library reference books purchased pursuant to La.Rev.Stat.Ann. § 17:351 are ordered from lists approved by the Louisiana Board of Elementary and Secondary Education. Fine deposition at 186 and Ex. 57.

Books and instructional materials may only be ordered from state-approved lists and sources. Fine deposition at 129 and Ex. 25. Intervenors argue that these safeguards are more than adequate to assure that the funds are not used for religious purposes.

In June of 1995, the United States Supreme Court most recently examined the Establishment Clause in Rosenberger v. Rector & Visitors of Univ. of Va., ---U.S.----, 115 S.Ct. 2510 (1995). In Rosenberger, the University of Virginia withheld authorization for payments from its Student Activities Fund to cover the printing costs of a religious newspaper issued by a student group. The University found that the student newspaper "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality," as prohibited by the University's guidelines. Id. at 2513. The Supreme Court found no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause. Id. at 2525.

The Rosenberger court stated "[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." Id. at 2521. The Supreme Court found that the Student Activities Fund (SAF) was neutral toward religion and that there was no suggestion that the SAF had been created to advance religion or to aid a religious cause. Id. at 2522.

***13** The Rosenberger Court reaffirmed the principle that there are "special Establishment Clause dangers where the government makes direct money payments to sectarian institutions ...." Id. at 2523. The Supreme Court was careful to point out the following:

> We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity. Neither the Court of Appeals nor the dissent, we believe, takes sufficient cognizance of the undisputed fact that no public funds flow directly to WAP's coffers.

Id.

Before Rosenberger was decided, in January 1995, the Ninth Circuit Court of Appeals addressed the constitutionality of Chapter 2 in Walker. The Ninth Circuit Court of Appeals held "that under Chapter 2, the loaning of neutral, secular equipment and instructional materials to parochial schools does not have the primary or principal effect of advancing religion." 46 F.3d at 1465. In Walker, the San Francisco Unified School District (the District) received the Chapter 2 funds from the State and then the District directly purchased the materials for the private schools. Id. at 1464. Title to all of the materials and equipment purchased remained with the District. Id. There were no funds directly provided to the private schools. Id. The materials and equipment purchased for the private schools included "library books, textbooks, videos, overhead projectors, movie and slide projectors and projection stands, television sets, record players, cassette recorders, VCR's, video cameras, 'listening centers,' globes and maps, microscopes and other lab equipment, computer equipment, musical equipment, stereo systems, and desks and tables." Id.

The Walker court applied the three part test set forth in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1976). The three part Lemon test requires that for a state aid program to be constitutional, 1) it must have a secular legislative

purpose; 2) it must not have as its principal or primary effect the advancement or inhibition of religion; and 3) it must not foster excessive government entanglement with religion. 46 F.3d at 1455. In Walker, the Ninth Circuit found that Chapter 2 funding passes all three prongs of the Lemon test. 46 F.3d at 1469.

The Walker court found that "[t]he purpose of Chapter 2 is to improve resources available to schools to increase the quality of education." Id. at 1464. This was found to be a valid secular purpose.

As to the second prong, the Ninth Circuit held that "under Chapter 2, the loaning of neutral, secular equipment and instructional materials to parochial schools does not have the primary or principal effect of advancing religion." Id. at 1465. The Walker court chose not to rely on Meek and Wolman which had struck down programs which loaned neutral and secular instructional materials and equipment to parochial schools. Rather the court in Walker relied on recent Supreme Court cases which have focused on government neutrality toward religion. Id. at 1466.

*14 The Walker court stated:

> Government neutrality becomes suspect when, in practical effect, the governmental aid is targeted at or disproportionately benefits religious institutions, or when, in symbolic effect, the governmental aid creates a symbolic union between church and state. We therefore must analyze (1) whether the Chapter 2 benefit at issue is a general welfare benefit neutrally available to a broad class of people without reference to religion, Zobrest, ---U.S. at ____, 113 S.Ct. at 2466, and (2) whether the benefit, even though generally available, creates a symbolic union of

> church and state. Ball, 473 U.S. at 389, 105 S.Ct. at 3226.

46 F.3d at 1467.

Applying the first part of the test, the Walker court found that Chapter 2 benefits are neutrally available without reference to religion. Id. The court found that 74% of the benefits went to public schools with the remaining 26% divided between nonreligious and religious private schools. Id. Thus the court held that "the overwhelming percentage of beneficiaries are nonparochial schools and their students." Id.

In addition, the court found that controls were in place to prevent Chapter 2 benefits from being "diverted" to religious instruction, such as, (a) prescreening the textbooks and other materials; (b) title to the books and materials remains in the public agency; (c) parochial schools pledge not to use the Chapter 2 materials for religious purposes; (d) the School District made yearly monitoring visits; and (e) all Chapter 2 services must be provided by persons independent of the private school and of any religious organizations. Id.

As to the second part of the test, the Walker court found that the loaning of instructional materials and equipment to parochial schools pursuant to Chapter 2 did not create a symbolic union between church and state. Applying Zobrest, the court found that if having a public employee present in a parochial school classroom does not create a symbolic union between church and state, then providing religiously neutral instructional materials and equipment to parochial schools does not create a symbolic union either. 46 F.3d at 1468.

The Walker court distinguished the statutes struck down in Meek and Wolman from Chapter 2, finding that the statutes in Meek and Wolman were not neutral. In Meek and Wolman, most of the aid was targeted at private schools, the majority of which were church-related. 46 F.3d at 1468. In Walker, 74% of the Chapter 2 benefits went to public schools, and of the remaining 26%, less than 70% of the 26% went to religious private schools. Id. Thus the court found that "Chapter 2 is a neutral, generally applicable statute that provides benefits to all schools, of which the overwhelming beneficiaries are nonparochial schools." Id. Thus Chapter 2 was found not to have as its principal or primary effect the advancement or inhibition of religion. Id. at 1469.

***15** Finally, the Walker court analyzed whether all of the controls in place to prevent Chapter 2 benefits from being diverted to religious instruction resulted in excessive entanglement between church and state. 46 F.3d at 1469. The court noted that the Supreme Court in Zobrest did not even mention the third prong of Lemon when it allowed an interpreter to be present in a pervasively sectarian parochial school classroom. Id. Since the Zobrest Court did not find excessive governmental entanglement, the Walker court followed the lead in Zobrest and found that the Chapter 2 controls did not result in excessive entanglement between church and state. Id.

Based on Rosenberger and Walker, this Court finds that the Chapter 2 funding passes all three prongs of the Lemon test. It is clear that the neither the state nor the federal government makes any direct money payments to the nonpublic schools, which was the "special Establishment Clause danger []" set forth in Rosenberger. 115 S.Ct. at 2523. No public funds were received by the nonpublic schools in Jefferson Parish.

Applying the first prong of the Lemon test, as the court found in Walker, Chapter 2 passes the first part of the Lemon test. Increasing the quality of education is clearly a valid secular purpose. 46 F.3d at 1464.

As to the second prong, this Court will follow the finding of the Ninth Circuit that the loaning of neutral, secular equipment and instructional materials to parochial schools pursuant to Chapter 2 does not have the primary or principal effect of advancing religion. Id. at 1465. The facts in the instant case are virtually indistinguishable from those present in Walker.

This Court finds that Chapter 2 benefits are neutrally available without reference to religion. Between 70 and 75% of Chapter 2 benefits are allocated to public schools each year, and between 25 and 30% are allocated to the nonpublic schools, including both private and religious schools. Thus as in Walker, it is clear that the overwhelming percentage of Chapter 2 benefits is provided to the public schools.

In addition, all of the monitoring controls in effect in Walker are present in this case. The library books and other instructional equipment are prescreened and title remains with the public agency. Most parochial schools sign a pledge agreeing not to use the Chapter 2 materials for religious purposes and the Chapter 2 coordinator makes yearly monitoring visits to the nonpublic schools. In addition, the State makes monitoring visits every two years to the nonpublic schools. Finally, employees of a public agency provide the Chapter 2 services and no money is directly paid to the parochial schools. The Court follows Walker and finds that these controls are sufficient to prevent Chapter 2 benefits from being diverted to religious instruction.

This Court will also follow the holding of Walker that the loaning of instructional materials and equipment to parochial schools pursuant to Chapter 2 did not create a symbolic union between church and state. For all of these reasons, this Court finds that Chapter 2 does not have as its principal or primary effect the advancement or inhibition of religion.

***16** Finally this Court finds that the controls in place to prevent Chapter 2 benefits from being diverted to religious use did not result in excessive entanglement between church and state, relying on Walker and Zobrest. Thus Chapter 2 complies with the third prong of Lemon.

Based on the Ninth Circuit's 1995 decision in Walker and recent United States Supreme Court decisions, in particular, Zobrest and Rosenberger, this Court will now set aside the prior court's March 27, 1990 ruling. This Court finds that Chapter 2, now known as Subchapter VI of the Improving America's Schools Act of 1994, 20 U.S.C. §§ 7301-7373, and the Louisiana Equipment and Materials Statute, La.Rev.Stat. §§ 17:351-54, do not violate the Establishment Clause, facially and/or as applied in Jefferson Parish, Louisiana. This Court will vacate the Order and Reasons of March 27, 1990, and deny plaintiffs' motion for partial summary judgment on Chapter 2 and the Louisiana Equipment and Materials Statute and will grant the motions of the federal defendants, the state defendants, and the intervenors for summary judgment on Chapter 2 and the Louisiana Equipment and Materials Statute.

Motion of plaintiffs to alter or amend the judgment on the school bus
transportation program

La. Rev. Stat. 17:158 requires that each parish or school board provide free transportation for any student attending a

school within its jurisdictional boundaries if the student resides more than one mile from the school, and allows that parish or school board to contract out the transportation services. The statute applies to all eligible public and non-public school students.

The JPPS provided transportation to over 41,000 students by school bus in 1988-1989 (coinciding with the trial), of which 85.6 % were public school students, 12.4 % were Catholic in-district school students, and 1.4 % were Catholic out-of-district students, and .5 % were Lutheran school students. Catholic out-of-district students are Catholic school students who attend Catholic school at schools which are not within their church parishes, sometimes because their church parishes do not have schools.

The Supreme Court has held that the Establishment Clause of the First Amendment does not prohibit the state from paying for the transportation of schools children to parochial as well as public schools, so long has the school has no control over the expenditure of the fund and the effect of the expenditure is unrelated to the content of the education provided. Wolman v. Walter, 433 U.S. 229, 253, 97 S.Ct. 2593, 2608 (1977). The provision of such transportation to the parochial school student is constitutional if the school does not determine how often the child is transported, i.e., the child must make one-round trip to and from school every day and the travel is unrelated to any aspect of the curriculum. Wolman, 433 U.S. at 253, 97 S.Ct. at 2608.

At issue in this particular motion is the decision of Judge Heebe that it is constitutional for the JPPS and the State of Louisiana to provide funds to the Jefferson Parish Nonpublic School Transportation Corporation for the purpose of contracting bus services to students who attend non-public schools in JP, but that it is unconstitutional to send the

money directly to the schools, i.e., Westbank Cathedral Academy and Faith Lutheran School, because there is no limitation on the way those schools could use the money.

*17 The Jefferson Parish Nonpublic School Transportation Corporation ("the corporation") is a corporation established by parents of children who attend nonpublic schools. The purpose of the corporation was to provide transportation to these children to and from school. The reason the corporation was established was that there was a significant funding cut to the JPPS for transportation in the 1988-1989 school year, and thus no funds were allocated for transportation services to children attending non-public schools outside of their district. The JPPS hired bus drivers and set up bus routes for both public school children and non-public school children attending school in their districts.

After the routes were set, more funds were allocated to provide transportation to non-public school children attending school outside of their districts. In order to obtain the transportation, the corporation, which is non-religious and was set up exclusively to hire bus drivers to drive these children to and from school, was created and contracted with the JPPS to provide purely secular transportation services. JPPS also contracted directly with two religious schools to provide their own transportation services and paid them directly.

Judge Heebe found that providing funding to the private corporation to supply purely secular transportation services to nonpublic school students was not unconstitutional in design, or in practice, except that sending the funding directly to two pervasively sectarian schools, i.e., Westbank Cathedral Academy and Faith Lutheran School, was unconstitutional as it was direct money to the schools which they could divert to religious purposes.

The plaintiffs disagree with this holding, but the decisions of Rosenberger, 115 S.Ct. 2510 (1995), and Walker, 46 F.3d 1449 (9th Cir. 1995) both support it. As previously noted in the Chapter 2 discussion, Rosenberger holds that there are "special Establishment Clause dangers where the government makes direct money payments to sectarian institutions," but that when the services or funds supplied are neutral, routine, and secular, then any benefit to religion is incidental to the government's provision of the services and does not offend the Constitution. 115 S.Ct. at 2523-2524. Judge Heebe found that the funds were used by the corporation solely for transportation services, which is a secular, neutral, and routine service, and that a variety of schools with children of all different religions use the transportation services.

Upon review of the entire matter, Judge Heebe's decision should be upheld and thus, the plaintiffs' motion to alter or amend the judgment on the school bus transportation program should be denied. [FN3]

FN3. This Court is somewhat troubled by the apparent lack of monitoring of the corporation's use of the funds, but considering the limited nature of the corporation's functions, does not find the program unconstitutional.

Motion of state defendants for leave of court to adopt amendment to the regulations governing reimbursement for required services

In the judgment entered on July 25, 1994, Judge Heebe enjoined further administration of the Reimbursement of Required Costs Program "until such time as it has been satisfactorily demonstrated to this Court that the Louisiana

Superintendent of Education and the Board of Elementary and Secondary Education (BESE) will properly administer the reimbursement program as prescribed by La. Rev. Stat. 17:361-365." In 1996, BESE adopted a motion to amend the regulations governing the program to allow for alternative documentation for missing time sheets for the school years 1993-94, 1994-95, and 1995-96 only. In exchange for allowing alternative documentation, which BESE determined to be necessary due to the past laxity in the administration of the program, only 70 % of the claimed amount would be considered for payment.

*18 The plaintiffs oppose the motion because the statute requires that actual time records be kept and that estimates or "parameters" were not sufficient documentation for payment. They further note that unless "actual cost" to the school is used as a basis for determining what funds are due, there is the possibility that the nonpublic schools can greatly inflate the claim. By way of example, one school which requested 705 hours for performing a particular service for the 1984-1985 school year sought reimbursement for 3,860 hours for performing the same service for the 1992-1993 school year.

Apparently, there are only 5 schools which will be affected by the change in the regulations and only three school years are included. The nature of the relief requested is minimal and the schools' requests will, at a minimum, be subject to a 30 % reduction. At the present time, payment of funds under the Required Services Reimbursement program is enjoined due the inadequacy of the auditing procedure. Considering the totality of the circumstances, the Court finds that the request is reasonable and does not infringe on the plaintiff's constitutional rights and thus will provide this limited relief to the state defendants.

Accordingly,

IT IS ORDERED that the Motion of the Federal Defendants, Richard W. Riley as Secretary of the United States Department of Education, and the United States Department of Education, for Reconsideration of this Court's Ruling on the Chapter 2 Program as Administered in Jefferson Parish, Louisiana, be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the Motion of Intervenors, Guy Mitchell, Jan Mitchell, Earline Castillon, Eugene Cerise, and Kathy Cerise, for Reconsideration of the Court's March 1990 Summary Judgment Order on the Chapter 2 Program and the Louisiana State School Books and Materials Program, as Applied in Jefferson Parish, Louisiana (Doc. 367), be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the Order and Reasons entered on March 27, 1990 (Doc. 220), be, and the same is hereby VACATED, except to the extent that such Order and Reasons found that those nonpublic schools in Jefferson Parish, Louisiana, which are operated under the auspices of the Archdiocese of New Orleans, are "pervasively sectarian." (Doc. 220, p. 11)

IT IS FURTHER ORDERED that the Motion of Plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, for Partial Summary Judgment on the Chapter 2 Program and the Louisiana State School Books and Materials Program (Doc. 165), be, and the same is hereby DENIED.

IT IS FURTHER ORDERED that the Cross-Motion of Intervenors, Guy Mitchell, Jan Mitchell, Earline Castillon, Eugene Cerise, and Kathy Cerise, for Summary Judgment on

Plaintiffs' Chapter 2 claims (Doc. 178), be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the Cross-Motion of Federal Defendants, Richard W. Riley as Secretary of the United States Department of Education, and the United States Department of Education, for Summary Judgment on Chapter 2 (Doc. 180), be, and the same is hereby GRANTED.

*19 IT IS FURTHER ORDERED that the Motion of the State Defendants, Cecil J. Picard as Louisiana Superintendent of Public Instruction, Kenneth Duncan as Louisiana State Treasurer, and the Louisiana State Board of Elementary and Secondary Education, for partial summary judgment on Chapter 2 and the Louisiana State School Books and Materials Program (Doc. 166), be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the Motion of Federal Defendants, Richard W. Riley as Secretary of the United States Department of Education, and the United States Department of Education, to Alter or Amend this Court's Judgment of July 25, 1994, in which this Court declared unconstitutional and enjoined portions of the federal Chapter 2 program as administered in Jefferson Parish, Louisiana (Doc. 379), be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the Motion of Intervenors, Guy Mitchell, Jan Mitchell, Earline Castillon, Eugene Cerise, and Kathy Cerise, to Alter or Amend the Court's Judgment of July 25, 1994, with respect to Chapter 2 and the Louisiana state books and materials program (Doc. 380), be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the Motion of Federal Defendants, Richard W. Riley as Secretary of the United States Department of Education, and the United States Department of Education, to Stay the Judgment Entered by this Court on July 25, 1994 (Doc. 381), be, and the same is hereby MOOT.

IT IS FURTHER ORDERED that the Motion of State Defendants, Cecil J. Picard as Louisiana Superintendent of Public Instruction, Kenneth Duncan as Louisiana State Treasurer, and the Louisiana State Board of Elementary and Secondary Education, to Partially Stay the Judgment Entered on July 25, 1994, with respect to the unconstitutionality of the Chapter 2 program in Jefferson Parish (Doc. 384), be, and the same is hereby MOOT.

IT IS FURTHER ORDERED that the Amended Motion of State Defendants, Cecil J. Picard as Louisiana Superintendent of Public Instruction, Kenneth Duncan as Louisiana State Treasurer, and the Louisiana State Board of Elementary and Secondary Education, for Partial Stay of the Judgment Entered on July 25, 1994, with respect to the unconstitutionality of the Chapter 2 program and La.R.S 17:351-52 in Jefferson Parish (Doc. 392), be, and the same is hereby MOOT.

IT IS FURTHER ORDERED that the Motion of Intervenors, Guy Mitchell, Jan Mitchell, Earline Castillon, Eugene Cerise, and Kathy Cerise, for Partial Stay of the Implementation of the Court's July 25, 1994 Judgment with Respect to Chapter 2, the Louisiana State Books and Materials Program (Doc. 394), be, and the same is hereby MOOT.

IT IS FURTHER ORDERED that the Motion of Plaintiffs Mary L. Helms, individually and on behalf of her daughter,

Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, to Alter or Amend the Judgment regarding the School Bus Transportation Program (Doc. 388) be, and the same is hereby DENIED.

IT IS FURTHER ORDERED that the Motion of the State Defendants, Cecil J. Picard as Louisiana Superintendent of Public Instruction, Kenneth Duncan as Louisiana State Treasurer, and the Louisiana State Board of Elementary and Secondary Education (Doc. 455) for Leave of Court to Adopt Amendments to the Regulations Governing Reimbursement for Required Services be, and the same is hereby GRANTED.

AMENDED JUDGMENT

*20 Considering the record, this Court's ruling on the motions of intervenors and the state defendants to lift the injunction, the Order and Reasons entered this date on all outstanding motions, and the law, the Final Judgment entered by Judge Frederick J.R. Heebe on July 25, 1994 (Doc. No. 374) is hereby AMENDED in the following respects:

IT IS ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of defendants, Cecil J. Picard as the Louisiana Superintendent of Public Instruction; Kenneth Duncan as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Richard W. Riley as Secretary of the United States Department of Education; United States Department of Education; Jefferson Parish School Board (JPSB); Elton Lagasse as Superintendent of the Jefferson Parish Public School System; Laurie Rolling, as President and member of the Jefferson Parish School Board; Libby Moran, as Vice President and member of the Jefferson Parish School Board;

Robert Wolfe, Barry Bordelon, O.H. Guidry, Cedric Floyd, Dr. Polly Thomas, Gene Katsanis, and Martin Marino, as members of the Jefferson Parish School Board; and in favor of intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch; and against plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol; DECLARING that the provision of instructional equipment (including computer and audio-visual equipment), educational materials (other than textbooks), library books, and supplies to pervasively sectarian schools in Jefferson Parish, Louisiana under Chapter 2 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 2911-76, or as reauthorized by Congress, and under La.Rev.Stat. §§ 17:351-52, or as reauthorized by the Louisiana state legislature, is constitutional under the Establishment Clause of the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the permanent injunction previously entered against defendants, Cecil J. Picard as the Louisiana Superintendent of Public Instruction; Kenneth Duncan as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Richard W. Riley as Secretary of the United States Department of Education; United States Department of Education; Jefferson Parish School Board (JPSB); Elton Lagasse as Superintendent of the Jefferson Parish Public School System; Laurie Rolling, as President and member of the Jefferson Parish School Board; Libby Moran, as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Cedric Floyd, Dr. Polly Thomas, Gene Katsanis, and Martin Marino, as members of the Jefferson Parish School Board enjoining them from

furnishing instructional equipment (including computer and audio-visual equipment), educational materials (other than textbooks), library books, and supplies to pervasively sectarian schools under Chapter 2 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 2911- 76, or as reauthorized by Congress, and under La.Rev.Stat. §§ 17:351- 52, or as reauthorized by the Louisiana legislature, be and is hereby LIFTED AND VACATED.

***21** In all other respects, the Judgment remains as entered.

1994 WL 406406 (E.D. La.)

Mary L. HELMS, individually and as next friend of Amy T. Helms, a minor, et al., Plaintiffs,
v.
Raymond K. ARVESON, as Louisiana State Superintendent of Instruction; et al., Defendants,
Guy Mitchell, et al., Intervenors.

Civ.A. No. 85-5533.

United States District Court,
E.D. Louisiana.

July 25, 1994.

Lee Boothby, Boothby & Yingst, Washington, D.C., for Plaintiffs.

Jack A. Grant, Grant & Barrow, Grenta, La., for Defendant, Jefferson Parish School Bd.; Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Bd.; and Polly Thomas as Vice President and member of the Jefferson Parish School Bd., Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Bd.

Tom Rayer, Denechaud & Denechaud, New Orleans, La., for Defendant, the Special Educational Services Corp.

Drake Cutini, U.S. Department of Justice, Civil Div., Washington, D.C., for defendant, Richard W. Riley as Secretary of the U.S. Dept. of Educ.

William F. Baity, Asst. U.S. Atty., Chief, Civil Div., New Orleans, for Richard W. Riley as Secretary of the U.S. Dept. of Educ.

Rose Polito Wooden and James C. Hrdlicka, Assts. Atty. Gen., Louisiana Dept. of Justice, Baton Rouge, La. for defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; and Louisiana State Bd. of Elementary and Secondary Educ.

William T. D'Zurilla, New Orleans, La., Patricia A. Dean, Arnold & Porter, Washington, D.C. for Intervenors, Guy and Jan Mitchell, Earline Castillon, and Edward and JacLynn Welsch.

HEEBE, Senior District Judge.

ORDER

*1 This cause came on for hearing on a previous day on the motion of plaintiffs for settlement of judgment.

The Court, having heard the arguments of counsel and having studied the legal memoranda submitted by the parties, is now fully advised in the premises and ready to rule.

REASONS

The Court issued its opinion in this matter on June 10, 1994. In its opinion, the Court requested that both plaintiffs and defendants submit a proposed judgment in accordance with

the Court's Findings of Fact and Conclusions of Law. The parties have been unable to agree on a proposed judgment. Thus, plaintiffs have now filed a motion for settlement of judgment. To their motion, plaintiffs have attached a judgment which addresses all of the issues decided in this Court's opinion of June 10, 1994, and this Court's order of March 2, 1990 on the Chapter 2 issue.

Intervenors responded to plaintiffs' motion for settlement of judgment, arguing that the Court should only enter a partial judgment and not include in this judgment the Court's earlier rulings on Chapter 2. Intervenors claim that since both the federal defendants and the intervenors have filed motions for reconsideration of the Chapter 2 issue which are set for hearing on August 17, 1994, this Court should withhold judgment on the federal Chapter 2 program and the Louisiana state books and materials program which are the subjects of the reconsideration motions. They claim that this approach would be more efficient and practical than entering final judgment on all claims now.

In the alternative, if the Court should conclude that judgment should be entered on all claims now, the intervenors contend that plaintiffs' judgment does not completely and accurately reflect the substance of this Court's Order and Reasons dated March 27, 1990 and this Court's opinion dated June 10, 1994. Intervenors have also submitted a proposed judgment.

The federal defendants, the Louisiana state defendants, Special Educational Service Corporation, and the Jefferson Parish School Board defendants all concur in the intervenors' position. The Louisiana state defendants also indicated that they intend to file motions concerning the required cost reimbursement program as it is presently administered. The Jefferson Parish School Board defendants request that the

Court delay entering any judgment at all until the Court decides the motions for reconsideration.

Plaintiffs respond that neither federal defendants nor intervenors will be prejudiced by having a motion to reconsider heard and decided after entry of judgment. In fact, plaintiffs note that the federal defendants' motion for reconsideration is a post-judgment motion and could be filed up to 10 days after the entry of judgment. Plaintiffs maintain that since any post-trial motion can be filed until 10 days after the entry of judgment, a delay until after the August 17, 1994 hearing will also delay the time in which federal defendants and other parties may file other post-trial motions. Plaintiffs argue that this will further delay the finality of the decision on all claims in this action.

***2** Plaintiffs also submit that until the actual judgment is entered by the Court on the Chapter 2 and Louisiana state books and materials programs, federal defendants, intervenors, and the other defendants will not know the exact contours of the judgment. After the entry of the judgment, the possibility exists that the defendants and the intervenors could file further post-judgment motions under Rules 59 and 60.

Plaintiffs also argue that intervenors' proposed judgment does not comply with Fed.R.Civ.P. 65(d). Rule 65(d) states: Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

In Blue v. Hogan, 553 F.2d 960, 962 (5th Cir.1977), the Fifth Circuit stated that failure to comply with Rule 65(d) requires reversal of the injunctive order and that an injunctive provision must describe in reasonable detail and not by reference to the complaint or other documents the act or acts to be restrained.

Plaintiffs submitted another proposed judgment with their reply brief, noting that their earlier proposed judgment may not have been completely in conformity with Fed.R.Civ.P. 65(d) and that there were some clerical changes.

After careful consideration of the memoranda and the proposed judgments submitted by the plaintiffs and the intervenors, the Court has decided to enter one judgment, encompassing both the Court's earlier ruling on the Chapter 2 issue and the Court's opinion of June 10, 1994. In the interest of finality, the Court will not enter a partial judgment, but a judgment on all of the issues addressed in this Court's opinion of June 10, 1994, and this Court's order of March 2, 1990 on the federal Chapter 2 issue and the Louisiana state books and materials program, La.Rev.Stat. §§ 17:351-52. The Court has prepared its own judgment, after duly considering the language proposed by plaintiffs and intervenors.

Accordingly,

IT IS THE ORDER OF THE COURT that the motion of plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, for settlement of judgment be, and the same is hereby GRANTED IN PART.

JUDGMENT

This Court issued its Order and Reasons regarding the constitutionality of Chapter 2, 20 U.S.C. §§ 2911-76, and the Louisiana books and materials program, La.Rev.Stat. §§ 17:351-52, on March 27, 1990 (Doc. 220), which issues were raised by the parties in cross-motions for summary judgment filed pursuant to Fed.R.Civ.P. 56. Thereafter, the remainder of plaintiffs' claims came on for trial before the Court, Honorable Frederick J.R. Heebe presiding, and the Court, having heard the testimony and having considered the record, the evidence, the transcript, the applicable law, and the memoranda submitted by the parties, rendered and filed an Opinion and made findings of fact and conclusions of law on June 10, 1994 (Doc. 337). This Court now enters a final judgment as to all of plaintiffs' claims for declaratory and injunctive relief in the above entitled action [FN1] as follows:

*3 IT IS ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol; and against defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Richard W. Riley as Secretary of the United States Department of Education; United States Department of Education; Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the

Jefferson Parish School Board; and against intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch, DECLARING that the provision of instructional equipment (including computer and audio-visual equipment), educational materials (other than textbooks), library books, and supplies to pervasively sectarian schools in Jefferson Parish, Louisiana under Chapter 2 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. § 2911-76, or as reauthorized by Congress, and under La.Rev.Stat. §§ 17:351-52, or as reauthorized by the Louisiana state legislature, is unconstitutional under the Establishment Clause of the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Richard W. Riley as Secretary of the United States Department of Education; United States Department of Education; Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board, and their successors in office, attorneys, agents, and employees and those acting in concert or with them be, and are hereby PERMANENTLY ENJOINED from furnishing instructional equipment (including computer and audio-visual equipment) educational materials (other than textbooks), library books, and supplies to pervasively sectarian schools under Chapter

2 of tile Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 2911-76, or as reauthorized by Congress, and under La.Rev.Stat. §§ 17:351-52, or as reauthorized by the Louisiana legislature. Said defendants are further DIRECTED to seek recovery of all such equipment currently on loan to pervasively sectarian schools located within Jefferson Parish.

*4 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol; and against defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board; and the Special Educational Services Corporation; and against intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch, DECLARING that the Louisiana special education statute, La.Rev.Stat. § 17:1941-1956, which allow state-paid special education teachers to teach core secular subjects throughout the day in self-contained or resource classrooms on the premises of pervasively sectarian institutions, including Immaculate Conception High School, Archbishop Rummell High School, St. Agnes Elementary School, St. Angela Elementary School, St. Francis Xavier Elementary School, and St. Christopher Elementary School, St. Francis Xavier Elementary School, and St. Mary Magdalen, is

unconstitutional as administered by the Jefferson Parish Public School System under the Establishment Clause of the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board; and the Special Educational Services Corporation; and in favor of intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch; and against plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, DECLARING that La.Rev.Stat. §§ 17:1944, 17:1946, 17:1949, and 17:1950, all relating to, special education, are constitutional on their face under the Establishment Clause of the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

*5 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board

(JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board; and the Special Educational Services Corporation; and in favor of intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch; and against plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, DISMISSING plaintiffs' claims related to the provision of special education services on the premises of Chinchuba Institute for the Deaf and Hope Haven/Madonna Manor.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board; and Special Educational Services Corporation, and their successors in office, attorneys, agents, and employees and those acting in active concert or participation with them who receive actual notice of the order by personal service or otherwise be, and are hereby PERMANENTLY ENJOINED from approving, funding, administering, implementing, or in any way

providing state-paid special education teachers to teach core secular subjects in self-contained and resource classrooms throughout the school day on the premises of pervasively sectarian schools, including Immaculate Conception High School, Archbishop Rummell High School, St. Agnes Elementary School, St. Angela Elementary School, St. Benilde Elementary School, St. Christopher Elementary School, St. Francis Xavier Elementary School, and St. Mary Magdalen, as the special education program has been administered by the Jefferson Parish Public School System.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board; and the Special Educational Services Corporation; and in favor of intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch; and against plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, DECLARING that the Louisiana Reimbursement of Required Costs statute, La.Rev.Stat. §§ 17:361-365, is constitutional on its face under the Establishment Clause of the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

*6 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol; and against defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board; and the Special Educational Services Corporation; and against intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch, DECLARING that the Louisiana, Reimbursement of Required Costs Statute, La.Rev.Stat. §§ 17:361-365, is unconstitutional as applied under the Establishment Clause of the First Amendment to the United States Constitution as made applicable to the states by the Fourteen, Amendment because in the administration of the statute there has not been adequate assurance provided that cash reimbursement to pervasively sectarian schools covers only secular services due to the fact that: (a) the Louisiana Superintendent of Education and the Legislative Auditor have failed to conduct audits of documents and accounts of the nonpublic schools; (b) the Louisiana Superintendent of Education has failed to check claim forms for substantive content on a regular basis; (c) the Louisiana Superintendent of Education has failed to require nonpublic schools to submit additional reports and documents sufficient to support applications for those reimbursements which exceed stated parameters; and (d) the "Regulations of Louisiana State Board of Elementary and

Secondary Education Pursuant to Louisiana Revised Statutes 17:361-17:365" fail to limit reimbursement specifically to state-prepared tests and not teacher-prepared tests.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; and Louisiana State Board of Elementary and Secondary Education (BESE); and their successors in office, attorneys, agents, and employees and those acting in concert with them be, and are hereby, PERMANENTLY ENJOINED from approving, funding, or administering the reimbursement program set forth in La.Rev.Stat. §§ 17:361-365, until such time as it has been satisfactorily demonstrated to this Court that the Louisiana Superintendent of Education and the Board of Secondary and Elementary Education (BESE) will properly administer the reimbursement program as prescribed by La.Rev.Stat. §§ 17:361-365, including the conducting of regular audits of documents and accounts of the nonpublic schools by the Superintendent of Public Education and the Legislative Auditor; the regular checking of claim forms for substantive content by the Superintendent of Public Education; the Superintendent of Public Education requiring nonpublic schools to submit additional reports and documents sufficient to support applications for all reimbursements which exceed stated parameters; the defining of "parameters" as to appropriate time for such required services in the "Regulations of Louisiana State Board of Elementary and Secondary Education Pursuant to Louisiana Revised Statutes 17:361-17:365"; the implementation of an effective procedure to be used to determine whether an expense properly falls within the acceptable parameters; and the establishment of procedures and regulations ensuring that reimbursement is limited to state-prepared tests as distinguished from teacher-prepared tests.

*7 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; and Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board; and in favor of intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch; and against plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, DECLARING that the Jefferson Parish School Board's school bus transportation program is constitutional under the Establishment Clause of the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol; and against defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System;

Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board; and against intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch, DECLARING that direct payments of public transportation funds to pervasively sectarian institutions, including Westbank Cathedral Academy and Faith Lutheran School, for the purpose of transporting their students violates the Establishment Clause of the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board, and their successors in office, attorneys, agents, and employees and those acting in active concert or participation with them who receive actual notice of the order by personal service or otherwise be, and are hereby PERMANENTLY ENJOINED from providing state transportation funds directly to pervasively sectarian schools, including Westbank Cathedral Academy and Faith Lutheran School.

*8 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board; and in favor of intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch; and against plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, DECLARING that La.Rev.Stat. § 17:158(C), which authorized reimbursement to parents transporting their children to school, is constitutional on its face and as previously administered and applied under the Establishment Clause of the First Amendment to Constitution as made applicable to the states by the Fourteenth Amendment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of defendants, Richard W. Riley as Secretary of the United States Department of Education and the United States Department of Education, and against plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, DECLARING that the "capital expenditures" provision of Chapter 1 of the Element and Secondary Education Act of 1965, as amended, 20 U.S.C. § 2727(d), is constitutional on its face under the Establishment Clause of the First Amendment to the United

States Constition as made applicable to the states by the Fourteenth Amendment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, may move, within such time as is allowed by applicable law, to recover their costs and attorneys' fees on those claims as to which they are prevailing parties, and that any party adverse to plaintiffs may oppose any such motion, which motion shall be decided by the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Richard W. Riley as Secretary of the United States Department of Education; United States Department of Education; Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board; and the Special Educational Services Corporation; and intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch, may move, within such time as is allowed by applicable law, to recover their costs incurred with respect to those claims as to which they are prevailing parties, and the plaintiffs may oppose any such motion, which motion shall be decided by Court.

FN1. Dr. Raymond K. Arveson, who succeeded Wilmer Cody as Louisiana Superintendent of Public Instruction, is substituted as a party defendant pursuant to Fed.R.Civ.P. 25(d)(1).

1990 WL 36124 (E.D. La.)

Mary L. HELMS, individually and as next friend of Amy T. Helms, a minor; et al., Plaintiffs,

v.

Wilmer CODY, as Louisiana State Superintendent of Instruction; et al., Defendant,

Guy Mitchell, et al., Intervenors.

CIV.A. No. 85-5533.

United States District Court, E.D. Louisiana.

March 27, 1990.

MINUTE ENTRY

HEEBE, Chief Judge.

ORDER AND REASONS

*1 This matter was submitted on the briefs to the Court without oral argument. Currently before the Court are the Motions of the Federal Defendants, the State Defendants, the Intervenors, and the Plaintiffs for Summary Judgment regarding the Constitutionality of the Chapter 2 education statute, 20 U.S.C. Sections 2701-3341, and La.Rev.Stat. Sections 17:351- 54.

The Court, having fully considered the legal memoranda submitted by the parties, is now fully advised in the premises and ready to rule. Accordingly,

IT IS THE ORDER OF THE COURT that the Motion of the Plaintiffs for Summary Judgment regarding the issue of Chapter 2, 20 U.S.C. Sections 2701-3341, and La.Rev.Stat. Sections 17:351-54, be, and the same is hereby GRANTED.

IT IS THE FURTHER ORDER OF THE COURT that the Motions of the Federal Defendants, the State Defendants, and the Intervenors for Summary Judgment regarding the issue of Chapter 2, 20 U.S.C. Sections 2701-3341, and La.Rev.Stat. Sections 17:351-54 be, and the same are hereby DENIED.

REASONS

The primary issue for consideration is whether 20 U.S.C. Sections 2701-3341 and La.Rev.Stat. Sections 17:351-52 violate the Establishment Clause, facially and/or as applied in Jefferson Parish in Louisiana. The statutes provide for school books, materials, and services which the plaintiffs contend directly aid the nonpublic, religiously affiliated elementary and secondary schools, in violation of the Establishment Clause. Plaintiffs move for summary judgment asking the Court to declare the two statutes unconstitutional. Plaintiffs do not challenge in their current Motion for Summary Judgment the benefits being provided pursuant to these statutes to non-sectarian, non- religiously affiliated, non-discriminatory private schools.

Defendants and Intervenors contend that the statutes are constitutional because 1) the statutes have a secular purpose; 2) the nonpublic schools are not the primary beneficiaries of the aid; 3) the schools receiving the aid are not pervasively sectarian; and 4) the aid neither advances religion nor causes excessive entanglement. The Defendants and Intervenors move for summary judgment, asking the Court to declare the two statutes constitutional.

The statutes, in pertinent part, read as follows:

Section 351:

A. The State Board of Elementary and Secondary Education shall prescribe and adopt school books and other materials of instruction, which it shall supply without charge to the children of this state at the elementary and secondary levels out of funds appropriated therefor by the legislature in accordance with the requirements of Article VIII, Section 13(A) of the Constitution.

B. The board also shall prescribe and supply schoolbooks and other materials of instruction for use by students attending vocational-technical schools and programs under the jurisdiction of the board.

Section 352:

A. The State Board of Elementary and Secondary Education, the State Department of Education, or either of these shall take such action as is necessary to assure that all school books, films and booklets related thereto, other similar audio-visual devices, and any other similar materials of instruction are thoroughly screened, reviewed and approved as to their content by the State Board of Elementary and Secondary Education and the local parish or city school board concerned.

*2 C. The State Board of Elementary and Secondary Education shall adopt rules and regulations to carry out the provisions of this Section.

La.Rev.Stat. Sections 17:351-52.

Twenty U.S.C. Section 2972(a)(1) provides, inter alia, that:

a local educational agency [LEA] ... shall provide for the benefit of such children in such school's secular, neutral, and nonideological services, materials, and equipment, including the participation of the teachers of such children (and other educational personnel serving such children) in training programs, and the repair, minor remodeling, or construction of public facilities as may be necessary ...

The nonpublic schools in Jefferson Parish have participated primarily in the instructional resources program whereby large quantities of instructional equipment (such as slide projectors, movie projectors, overhead projectors, television sets, tape recorders, projection screens, maps, globes, filmstrips, cassettes, computers, as well as library books and resource materials) are purchased with Chapter 2 funds and transferred to nonpublic school sites. (See Lewis Exs. 4 and 5).

Nonpublic schools in Jefferson Parish have participated in the past exclusively under the subchapter B provision of the program, 20 U.S.C. Section 2941(b). (Woodward at 28-29). Under this subchapter, nonpublic schools receive an allotment which allows them to order instructional materials and equipment, including library books. No textbooks are ordered under Chapter 2 in Jefferson Parish. (Woodward at 128). Besides library books, the equipment ordered by schools includes computers and computer peripherals, computer software, projectors, screens, maps, and globes. (Kropog Exs. 2, 8, 9, and 10; Woodward Ex. 1; Plaintiffs' Motion Exs. 1-6). In Louisiana, the funds allocated to nonpublic schools under Chapter 2 for 1985 totalled $5,064 per school.

ISSUE: WHETHER CHAPTER TWO'S MATERIAL, EQUIPMENT, AND SUPPLIES PROVISIONS AND LA.REV.STAT. SECTIONS 17:351-54 VIOLATE THE ESTABLISHMENT CLAUSE ACCORDING TO THE THREE-PART LEMON TEST.

In Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1976), the Court set forth a three part test for determining whether government aid to private schools is constitutional. The three part Lemon test requires that for a state aid program to be constitutional, 1) it must have a secular legislative purpose, 2) it must not have as its primary effect the advancement nor inhibition of religion, and 3) it must not foster excessive entanglement. 403 U.S. 602, 612-13. In the present case, there is a legitimate secular legislative purpose to the statutes: to improve elementary and secondary education for children attending both public and private schools. 20 U.S.C. Section 3811(a). Therefore, the aid meets the first part of the Lemon test.

The second prong of the Lemon test provides that the government aid to private education must neither advance nor inhibit religion. The Court has held that the pervasive sectarianism of an institution raises a presumption that any direct aid to that school either advances or inhibits religion. Bowen v. Kendrick, --- U.S. ----, 108 S.Ct. 2562, 2576 (1988) (Citations omitted). Therefore, an analysis of whether the institutions in this case are pervasively sectarian will be undertaken.

*3 ISSUE: WHETHER THE PRIMARY BENEFICIARIES OF THE AID ARE PERVASIVELY SECTARIAN.

Several Supreme Court cases provide guidance in making a determination regarding whether the primary beneficiaries of the aid are pervasively sectarian. In School District of Grand

Rapids v. Ball, 473 U.S. 373, 384 (1985), 40 out of 41 schools participating in the challenged programs were identifiably sectarian. In Aguilar v. Felton, 473 U.S. 402, 406 (1985), 84% of Chapter 1 students in nonpublic schools were in Catholic schools, and 8% in Hebrew schools. In Wolman v. Walter, 433 U.S. 229, 234 (1977), only 29 out of 720 nonpublic schools were not sectarian, and only 4% of the nonpublic school students attended nonsectarian schools. More than 96% of the nonpublic enrollment attended sectarian schools, and more than 92% attended Catholic schools. Id. In Meek v. Pittenger, 421 U.S. 349, 364 (1975), the Court found the primary beneficiaries of the aid in question to be sectarian schools because they accounted for more than 75% of nonpublic schools.

In Felton, 473 U.S. at 412, the Court addressed an argument that the program at issue should be upheld because many of the schools did not have the degree of sectarianism that would trigger Establishment Clause problems. The Court answered by quoting with approval the Second Circuit opinion in Felton:

"Yet ... enforcement of the Establishment Clause does not rest on means or medians. If any significant number of the Title I schools create the risks described in Meek, Meek applies...."

473 U.S. at 412, n. 8.

The Wolman Court relied heavily on the Meek Court's statement that:

The very purpose of many of those schools is to provide an integrated secular education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See Lemon v. Kurtzman, 403 U.S., at 616-17.

Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. '[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.'

Wolman, 433 U.S. at 250 (citations omitted). Further, the Wolman Court stated that: "[i]n view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools." Id. The factors, inter alia, upon which the Court determined that the schools in Wolman were pervasively sectarian are as follows:

1. the schools operated under the general supervision of the bishop of their diocese;

2. most principals were members of a religious order within the Catholic Church;

3. a little less than one-third of the teachers were members of the Catholic faith;

4. many of the rooms and hallways in these schools were decorated with a Christian symbol;

*4 5. the state-mandated five-hour day is expanded to include, usually, one-half hour of religious instruction;

Id. at 234.

A list of the nonpublic schools participating in the Jefferson Parish Chapter 2 program for 1986-87 (which is not materially different from the current participants) shows 46 participants. Of these, 41 are religiously- affiliated with 34

being Catholic schools. (Woodward Ex. 2; Fine Ex. 3). These religiously-affiliated schools receive 96% of the Chapter 2 funds allocated for nonpublic schools in Jefferson Parish. (Cannon Ex. 18). Additionally, 76% of the nonpublic schools participating in the state program under La.Rev.Stat.Ann. Sections 17:351-52 in Jefferson Parish are religiously-affiliated, and these schools receive 89% of the funds allocated under that program for nonpublic schools. (Cannon Ex. 18).

The Catholic schools, which represent the majority of nonpublic schools participating in the programs, operate under the general supervision and authority of the Archbishop of New Orleans and the parish pastor. (Kropog Vol. I at 202; Cannon Vol. I at 19; Kropog Vol. I at 203; Junkin at 10-11). The schools are located next to the parish church and sometimes the rectory or convent. (Cannon Vol. I at 23-24; Kropog Vol. I at 35-36; Junkin at 16). The schools contain religious symbols in the classrooms. (Junkin at 66).

At least some of the schools exercise a religious preference in accepting students (Cannon Vol. I at 21-22; Cannon Ex. 1, p. 3), and in charging tuition. (Cannon Vol. I at 85; Cannon Ex. 5). The official policy of the Archdiocese calls for a religious preference in the hiring of teachers. (Kropog Vol. II at 7-8; Kropog Ex. 18, p. 17). The contracts of principals and teachers in the schools of the Archdiocese contain a provision allowing termination for lifestyle contrary to the teachings of the Catholic church. (Kropog Vol. II at 13-14; Kropog Ex. 14, Sections A 1230.02, A 2130.06).

The schools require attendance at daily religion classes; some excuse non- Catholics, some do not. (Cannon Vol. I at 30; Kropog Vol. I at 58; Junkin at 56-58). The schools conduct sacramental preparation classes during the school

day. (Kropog Vol. I at 165). The schools also require attendance at Mass (Cannon Vol. I at 29; Kropog Vol. I at 37; Junkin at 60). Religious extracurricular activities are also provided. (Kropog Vol. I at 171-72).

The Archdiocese and the individual schools publish statements of philosophy under which the schools operate. (Cannon Exs. 1, 2, 3; Kropog Exs. 11, 12, 14; Junkin Exs. 1, 2-11, 13-15, 16-20, 22-24, 29, 31-33, 35, 37040). These statements indicate the pervasive sectarian nature of the schools and provide that the schools are institutions in which "education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious beliefs is consistently maintained." Felton, 473 U.S. at 412, quoting Meek v. Pittenger, 421 U.S. at 371.

The St. Anthony School Handbook, for instance, states in its introduction:

*5 Catholic education is intended to make men's faith become living, conscious and active through the light of instruction. The Catholic school is the unique setting within which this ideal can be realized in the lives of the Catholic children and young people.

Only in such a school can they experience learning and living fully integrated in the light of faith.... Here, too, instruction in religious truth and values in an integral part of the school program. It is not one more subject along side the rest, but instead it is perceived and functions as the underlying reality in which the student's experiences of learning and living achieve their coherence and their deepest meaning.

(Cannon Ex. 3, p. 2) (see also Jenkins Exs. 8-14, 16-20, 22-24, 29, 31-33, 35, 37-40).

The Handbook of Policies and Regulations for Elementary Schools of the Archdiocese of New Orleans indicates that the operation of the Catholic schools is governed by canon law. (Jenkins Ex. 22, pp. 1-4). The handbook lists the goals and objectives of the Catholic schools. It states: "Broad goals of the Catholic school are to teach the gospel message, to build communities, to be of Christian service and to worship together." (Id. at p. 4).

It lists the major objectives of the Catholic schools as follows:

To work closely with the home in educating children towards the fullness of Christian life.

To specifically teach Catholic principles and Christian values.

To offer personal experiences in Christian living through liturgy, sacramental life, prayer, guidance, and example. To instruct in human knowledge and skills which enable students to actively participate in the parish community and its society.

To recognize the dignity of the person.

To encourage teachers to become committed Christians and to develop professional competence.

(Jenkins Ex. 22, p. 5).

As the Plaintiffs state, the handbooks of the parochial schools in Jefferson Parish evidence that the schools under

the control of the Archdiocese are pervasively sectarian. The Handbook of Policies and Regulations for Elementary Schools refers to the pastor as "the spiritual and temporal shepherd of the parish" and states that "[h]e is the key person in relation to the parish education program." The pastor has "authority at the parish level" to veto decisions made by the local school board. (Jenkins Exhibit 22 at p. 10).

Under the Archdiocesan policy, "Catholic schools of the Archdiocese are open to all children regardless of race or ethnic background, but emphasis should be given to Catholic children." Additionally, the majority of the schools operated by the Archdiocese located in Jefferson Parish have one or more religious symbols located within the structure itself, including crucifixes, which are in the classrooms because the schools are religious. (Jenkins Dep., p. 106-110).

Mr. Howard Jenkins (Jenkins), the Superintendent of the parochial school system for the Archdiocese of New Orleans, indicated that a majority of the schools operated by the Archdiocese and located in Jefferson Parish require that students attend religion classes, and that the majority of those schools have some type of attendance requirement at exercises such as liturgies and prayer services. (Jenkins at 106-08).

***6** He also indicated that teachers employed at those schools are normally required to accompany their students to Mass. Further, the Plaintiffs illustrate that virtually every handbook of the Archdiocesan schools reveals the pervasive religious character of the schools. (See, Jenkins Exs. 1-35).

After reviewing each of the 35 exhibits, the Court finds that the schools operated under the auspices of the Archdiocese, the majority of the schools receiving Chapter 2 aid, are pervasively sectarian. Further support for this finding is

provided by the Court in Bowen v. Kendrick, --- U.S. ----, 108 S.Ct. 2562, 2574-78 (1988), where Justice Rehnquist stated that church affiliated elementary and secondary schools are, by their nature, deemed to be pervasively sectarian, while church affiliated colleges and universities are not. Id. 2574-78.

Leaving the analysis of the pervasive sectarianism of the majority of the nonpublic schools, we return to the remainder of the Lemon test.

In Meek v. Pittenger, 421 U.S. 349 (1975), the Court struck down a Pennsylvania statute which authorized the loan of instructional materials and equipment to nonpublic elementary and secondary schools. The Court found that the Act had the "primary effect of advancing religion because of the predominantly religious character of the schools benefitting from the Act." Meek, 421 U.S. at 363. The Court found that such aid to sectarian schools was "neither indirect nor incidental." Id. at 365. In Meek, "instructional equipment" was defined to include projectors, tape recorders, laboratory equipment, and "any other educational, secular, neutral, nonideological equipment." Id. at 354, n. 4. "Instructional material" was defined to include books, periodicals, filmstrips, film, records, tapes, and other similar material. Id.

The Court stated that even though the material and equipment was "self- policing, in that starting as secular, nonideological and neutral, they will not change in use, ... it would simply ignore reality to attempt to separate the secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and then to characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian." Id. at 365.

The program in Meek involved just under $12 million dollars of direct aid to predominantly church-related nonpublic schools of Pennsylvania through the loan of instructional material and equipment pursuant to Act 195. Id. at 365. Of the 1,320 nonpublic schools in Pennsylvania that qualified for aid under Act 195, more than 75% were church-related or religiously affiliated educational institutions. This amounts to approximately $9,090 per school, and the Meek Court firmly determined that this aid was "neither indirect nor incidental". Id.

Two years later, the Court in Wolman v. Walter, 433 U.S. 229 (1977), refused to deviate from the substance of the holding in Meek based upon the formalistic differences in the operation of the Ohio program challenged. The program in Wolman authorized the loan of instructional equipment and materials to the parents of nonpublic school students. The material to be lent was limited to that which was used in public schools and which was "incapable of diversion to religious use." Wolman, 433 U.S. at 248.

*7 In Wolman, the instructional materials and equipment included projectors, record players, tape recorders, maps, globes, science kits, and weather forecasting charts. Id. at 229. In Public Funds for Public Schools of N.J. v. Marburger, 358 F.Supp. 29, 34, n. 2 (D.N.J.1973), aff'd., 417 U.S. 961 (1974), "instructional materials" included tapes, discs, films, filmstrips, books, periodicals, and maps. "Supplies" were defined to include, among others, pencils, paper, crayons and paint. Id. Equipment included projectors, televisions, tape recorders, projection screens, and other similar equipment. Id. at 38.

Chapter 2 fails the second prong of the Lemon test because due to the pervasive sectarian nature of the schools affected

by the aid, the aid "inescapably ha[s] the primary effect of providing a direct and substantial advancement of the sectarian enterprise". Wolman, 433 U.S. 229, 250.

Leaving the examination of the second part of the Lemon test, advancement of religion, the third part will be addressed, that of excessive entanglement. In Meek and Wolman, the Courts did not address the issue of monitoring the use of materials and equipment by the nonpublic schools. However, in Marburger, a state program involving loans to nonpublic schools of instructional materials, equipment, and supplies was struck down. The Court expressed concern over the issue of entanglement. The materials had the susceptibility of diversion to religious use. The Court stated that a constant and continuous review and control of the manner in which the items were being used would have to be undertaken. Id. at 36, 40.

The New Jersey statute prohibited the loan of materials for use in sectarian religious courses or devotional exercises. However, the Court found this restriction ineffective in saving the constitutionality of the program because the enforcement of the limitations on the use of the funds would require a continuing and intolerable government presence in the affairs of the church. Id. at 38-39.

One of the key factors which allowed the Court to uphold the textbook loan program was the fact that the textbooks were approved as to their nonsectarian content before they were lent. Meek, 421 U.S. at 351-55. However, there is no such safeguard with respect to the library books lent under the Chapter 2 program.

The Chapter 2 challenge at issue in the current case, as well as the state equipment and materials statute, La.Rev.Stat. Sections 17:351-52, are similar to the statutes found

unconstitutional in Meek, Wolman, and Marburger. The aid provided pursuant to the two statutes is unconstitutional according to the cases of Meek, Wolman, and Marburger. First, the primary beneficiaries of the aid are nonpublic schools; second, the majority of the schools receiving the aid are pervasively sectarian; and third, the aid has the impermissible effect of advancing religion. Notably, both the defendants and the plaintiffs moved for summary judgment regarding this issue, stating that no issues of material fact remain regarding the Chapter 2 challenge. Therefore, the Court finds this issue proper for summary judgment at this time. Accordingly,

*8 IT IS THE ORDER OF THE COURT that the Motion of the Plaintiffs for Summary Judgment regarding the issue of Chapter 2, 20 U.S.C. Sections 2701- 3341, and La.Rev.Stat. Sections 17:351-54 be, and the same is hereby, GRANTED.

IT IS THE FURTHER ORDER OF THE COURT that the Motions of the Federal Defendants, the State Defendants, and the Intervenors for Summary Judgment regarding the issue of Chapter 2, 20 U.S.C. Sections 2701-3341, and La.Rev.Stat. Sections 17:351-54 be, and the same are hereby, DENIED.

ORDER ON REHEARING

(Reported at : 165 F.3d 311)

Mary L. HELMS, individually and as next friend of Amy Helms; Amy T. Helms, a minor; Marie L. Schneider, Plaintiffs-Appellants-Cross-Appellees-Appellees,

v.

Cecil J. PICARD, Louisiana Superintendent of Public Education; Kenneth Duncan, Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education; Jefferson Parish School Board System; Elton Lagasse, Superintendent of the Jefferson Parish School System; Laurie E. Rolling, President and member of the Jefferson Parish School Board; Libby Moran, Vice President and member of the Jefferson Parish School Board; Robert Wolfe, member of the Jefferson Parish School Board; Barry Bordelon, member of the Jefferson Parish School Board; O.H. Guidry, member of the Jefferson Parish School Board; Cedric Floyd, member of the Jefferson Parish School Board; Polly Thomas, member of the Jefferson Parish School Board; Gene Katsanis, member of the Jefferson Parish School Board; Martin Marino, member of the Jefferson Parish School Board, Defendants-Appellees-Cross-Appellants,

and

Richard W. Riley, Secretary of the United States Department of Education; United States Department of Education,

Defendants-Appellees,

And

Special Education Services Corporation, Defendant-Appellant,

And

Guy Mitchell; Jan Mitchell; Claire Friedrichs, Eddie Greer, Colleen Greer, Dennis Thornton, Darlene Thornton, Intervenor Defendants-Appellees-Cross-Appellants.

No. 97-30231.

United States Court of Appeals, Fifth Circuit.

Jan. 13, 1999.

Lee Boothby, Boothby & Yingst, Washington, DC, for Mary and Amy Helms and Marie Schneider.

Patricia Ann Dean, Andrew Tanner Karron, Arnold & Porter, Washington, DC, William Thomas D'Zurilla, Gordon, Arata, McCollam & Duplantis, New Orleans, LA, for Guy and Jan Mitchell, Claire Friedrichs, Eddie and Colleen Greer and Dennis and Darlene Thornton.

Howard S. Scher, Drake Stephen Cutini, Matthew Miles Collette, U.S. Dept. of Justice, Civil Div., Appellate Staff, Washington, DC, for Richard Riley and U.S. Dept. of Educ.

Jack A. Grant, Andree Hunter Greenleaf, Grant & Barrow, Gretna, LA, for Lagasse, Rolling, Moran, Wolfe, Bordelon, Guidry, Floyd, Thomas, Katsanis, Marino and Jefferson Parish Sch. Bd. System.

David Glen Sanders, Asst. Atty. Gen., Division of Litigation, Baton Rouge, LA, for Picard, Duncan and Louisiana State Bd. of Elementary and Secondary Educ.

Marshall Beil, Catherine A. Rogers, Ross & Hardies, New York City, for National Committee for Public Educ. and Religious Liberty, Amicus Curiae.

Marjorie Ruth Esman, New Orleans, LA, Kenneth M. Dreifach, Morrison & Foerster, New York City, for The American Civil Liberties Union and Anti-Defamation League, Amicus Curiae.

Thomas A. Rayer, Sr., Denechaud & Denechaud, New Orleans, LA, for Special Educ. Services Corp.

Appeals from the United States District Court for the Eastern District of Louisiana; Marcel Livaudais, Jr., Judge.

Before DUHE, BENAVIDES and STEWART, Circuit Judges. [FN1]

ON PETITIONS FOR REHEARING AND
SUGGESTIONS FOR REHEARING EN BANC
(Opinion 8/17/98, 5 Cir., 97-30231, 151 F.3d 347)

PER CURIAM:

*1 The Petitions for Rehearing are DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (Fed. R.App. P and 5th Cir. R. 35) the Suggestions for Rehearing En Banc are also DENIED.

For clarity, we amend that part of the last sentence of the panel opinion following the number (2) to read as follows:

". . . (2) we REVERSE the district court's grant of summary judgment in favor of Defendants and RENDER judgment in favor of Plaintiffs declaring that the Federal instructional materials program, 20 U.S.C. §§ 7301-7373, and its Louisiana counterpart, La.Rev.Stat.Ann. §§ 17:351-52, are unconstitutional as applied in Jefferson Parish, except as applied for the acquisition of textbooks which use is not challenged by this litigation; and (3) . . ."

FN1. Judges Wiener and Dennis did not participate in the consideration of the suggestion for rehearing en banc.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The First Amendment to the United States Constitution provides in pertinent part that:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . .

20 U.S.C. § 7301, *et seq.*

SUBCHAPTER VI – INNOVATIVE EDUCATION PROGRAM STRATEGIES

§ 7301. Findings and statement of purpose

(a) Findings

The Congress finds that division 2 of subchapter I of chapter 47 of this title [20 U.S.C.A. § 2911 et seq.] (as such division was in effect on the day preceding October 20, 1994) has been successful in achieving the goals of increasing local flexibility, reducing administrative burden, providing services for private school students, encouraging innovation, and contributing to the improvement of elementary and secondary educational programs.

(b) Statement of Purpose

It is the purpose of programs under this subchapter –

(1) to support local education reform efforts which are consistent with and support statewide reform efforts under Goals 2000: Educate America Act;

(2) to support State and local efforts to accomplish the National Education Goals;

(3) to provide funding to enable State and local educational agencies to implement promising educational reform programs;

(4) to provide a continuing source of innovation, and educational improvement, including support for library services and instructional and media materials; and

(5) to meet the special educational needs of at risk and high cost students.

(c) State and local responsibility

The basic responsibility for the administration of funds made available under this subchapter is within the State educational agencies, but it is the intent of Congress that the responsibility be carried out with a minimum of paperwork and that the responsibility for the design and implementation of programs assisted under this subchapter will be mainly that of local educational agencies, school superintendents and principals, and classroom teachers and supporting personnel, because such agencies and individuals have the most direct contact with students and are most likely to be able to design programs to meet the educational needs of students in their own school districts.

§ 7302. Authorization of appropriations; duration of assistance

(a) Authorization

To carry out the purposes of this subchapter, there are authorized to be appropriated $370,000,000 for fiscal year 1995 and such sums as may be necessary for each of the four succeeding fiscal years.

(b) Duration of assistance

During the period beginning October 1, 1994, and ending September 30, 1999, the Secretary shall, in accordance with the provisions of this subchapter, make payments to State educational agencies for the purpose of this subchapter.

§ 7303. "Effective schools programs" defined

For the purposes of this subchapter the term "effective schools programs" means school-based programs that may encompass preschool through secondary school levels and that have the objectives of (1) promoting school-level planning, instructional improvemcnt, and staff development, (2) increasing the academic achievement levels of all children and particularly educationally disadvantaged children, and (3) achieving as ongoing conditions in the school the following factors identified through effective schools research as distinguishing effective from ineffective schools:

(A) Strong and effective administrative and instructional leadership that creates consensus on instructional goals and organizational capacity for instructional problem solving.

(B) Emphasis on the acquisition of basic and higher order skills.

(C) A safe and orderly school environment that allows teachers and pupils to focus their energies on academic achievement.

(D) A climate of expectation that virtually all children can learn under appropriate conditions.

(E) Continuous assessment of students and programs to evaluate the effects of instruction.

PART A – STATE AND LOCAL PROGRAMS

§ 7311. Allotment to States

(a) Reservations

From the sums appropriated to carry out this subchapter in any fiscal year, the Secretary shall reserve not to exceed one percent for payments to outlying areas to be allotted in accordance with their respective needs.

(b) Allotment

From the remainder of such sums, the Secretary shall allot to each State an amount which bears the same ratio to the amount of such remainder as the school-age population of the State bears to the school-age population of all States, except that no State shall receive less than an amount equal to one-half of one percent of such remainder.

(c) Definitions

For purposes of this part:

(1) The term "school-age population" means the population aged 5 through 17.

(2) The term "States" includes the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

§ 7312. Allocation to local educational agencies

(a) Distribution rule

From the sums made available each year to carry out this subchapter, the State educational agency shall distribute not less than 85 percent to local educational agencies within such State according to the relative enrollments in public and private, nonprofit schools within the school districts of such agencies, adjusted, in accordance with criteria approved by the Secretary, to provide higher per pupil allocations to local educational agencies which have the greatest numbers or percentages of children whose education imposes a higher than average cost per child, such as –

(1) children living in areas with high concentrations of low-income families;

(2) children from low-income families; and

(3) children living in sparsely populated areas.

(b) Calculation of enrollments

(1) In general

The calculation of relative enrollments under subsection (a) of this section shall be on the basis of the total of –

(A) the number of children enrolled in public schools; and

(B) the number of children enrolled in private non-profit schools that desire that their children participate in programs or projects assisted under this subchapter, for the

fiscal year preceding the fiscal year for which the determination is made.

(2) Construction

Nothing in this subsection shall diminish the responsibility of local educational agencies to contact, on an annual basis, appropriate officials from private nonprofit schools within the areas served by such agencies in order to determine whether such schools desire that their children participate in programs assisted under this part.

(3) Adjustments

(A) Relative enrollments under subsection (a) of this section shall be adjusted, in accordance with criteria approved by the Secretary under subparagraph (B), to provide higher per pupil allocations only to local educational agencies which serve the greatest numbers or percentages of --

(i) children living in areas with high concentrations of low-income families;

(ii) children from low-income families; or

(iii) children living in sparsely populated areas.

(B) The Secretary shall review criteria submitted by a State educational agency for adjusting allocations under paragraph (1) and shall approve such criteria only if the Secretary determines that such criteria are reasonably calculated to produce an adjusted allocation that reflects the relative needs within the State's local educational agencies based on the factors set forth in subparagraph (A).

(c) Payment of allocations

(1) Distribution

From the funds paid to a State educational agency pursuant to section 7302 of this title for a fiscal year, a State educational agency shall distribute to each eligible local educational agency which has submitted an application as required in section 7332 of this title the amount of such local educational agency allocation as determined under subsection (a) of this section.

(2) Additional funds

(A) Additional funds resulting from higher per pupil allocations provided to a local educational agency on the basis of adjusted enrollments of children described in subsection (a) of this section, may, at the discretion of the local educational agency, be allocated for expenditures to provide services for children enrolled in public and private nonprofit schools in direct proportion to the number of children described in subsection
(a) of this section and enrolled in such schools within the local educational agency.

(B) In any fiscal year, any local educational agency that elects to allocate such additional funds in the manner described in subparagraph (A) shall allocate all additional funds to schools within the local educational agency in such manner.

(C) The provisions of subparagraphs (A) and (B) may not be construed to require any school to limit the use of such additional funds to the provision of services to specific students or categories of students.

PART B – STATE PROGRAMS

§ 7331. State uses of funds.

(a) Authorized activities

A State educational agency may use funds made available for State use under this subchapter only for –

(1) State administration of programs under this subchapter including –

(A) supervision of the allocation of funds to local educational agencies;

(B) planning, supervision, and processing of State funds; and

(C) monitoring and evaluation of programs and activities under this subchapter; and

(2) technical assistance and direct grants to local educational agencies and statewide education reform activities including effective schools programs which assist local educational agencies to provide targeted assistance.

(b) Limitations and requirements

Not more than 25 percent of funds available for State programs under this subchapter in any fiscal year may be used for State administration under subsection (a)(1) of this section.

§ 7332. State applications

(a) Application requirements

Any State which desires to receive assistance under this part shall submit to the Secretary an application which –

(1) designates the State educational agency as the State agency responsible for administration and supervision of programs assisted under this subchapter;

(2)(A) provides for a biennial submission of data on the use of funds, the types of services furnished, and the students served under this subchapter; and

(B) in fiscal year 1998 provides for an evaluation of the effectiveness of programs assisted under this subchapter;

(3) sets forth the allocation of such funds required to implement section 7372 of this title;

(4) provides that the State educational agency will keep such records and provide such information to the Secretary as may be required for fiscal audit and program evaluation (consistent with the responsibilities of the Secretary under this section);

(5) provides assurance that, apart from technical and advisory assistance and monitoring compliance with this subchapter, the State educational agency has not exercised and will not exercise any influence in the decisionmaking processes of local educational agencies as to the expenditure made pursuant to an application under section 7353 of this title;

(6) contains assurances that there is compliance with the specific requirements of this subchapter; and

(7) provides for timely public notice and public dissemination of the information provided pursuant to paragraph (2).

(b) Period of application

An application filed by the State under subsection (a) of this section shall be for a period not to exceed three years, and may be amended annually as may be necessary to reflect changes without filing a new application.

(c) Audit rule

Local educational agencies receiving less than an average of $5,000 each under this subchapter shall not be audited more frequently than once every five years.

PART C – LOCAL INNOVATIVE EDUCATION PROGRAMS

§ 7351. Targeted use of funds

(a) General rule

Funds made available to local educational agencies under section 7312 of this title shall be used for innovative assistance described in subsection (b) of this section.

(b) Innovative assistance

The innovative assistance programs referred to in subsection (a) of this section include –

(1) technology related to the implementation of school-based reform programs, including professional development to assist teachers and other school officials regarding how to use effectively such equipment and software;

(2) programs for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials which are tied to high academic standards and which will be used to improve student achievement and which are part of an overall education reform program;

(3) promising education reform projects, including effective schools and magnet schools;

(4) programs to improve the higher order thinking skills of disadvantaged elementary and secondary school students and to prevent students from dropping out of school;

(5) programs to combat illiteracy in the student and adult population, including parent illiteracy;

(6) programs to provide for the educational needs of gifted and talented children;

(7) school reform activities that are consistent with the Goals 2000: Educate America Act; and

(8) school improvement programs or activities under sections 6317 and 6318 of this title.

§ 7352. Administrative authority

In order to conduct the activities authorized by this subchapter, each State or local educational agency may use funds reserved for this subchapter to make grants to and to enter into contracts with local educational agencies, institutions of higher education, libraries, museums, and other public and private nonprofit agencies, organizations, and institutions.

§ 7353. Local applications

(a) Contents of application

A local educational agency or consortium of such agencies may receive an allocation of funds under this subchapter for any year for which an application is submitted to the State educational agency and such application is certified to meet the requirements of this section. The State educational agency shall certify any such application if such application –

(1)(A) sets forth the planned allocation of funds among innovative assistance programs described in section 7351 of this title and describes the programs, projects, and activities designed to carry out such innovative assistance which the local educational agency intends to support, together with the reasons for the selection of such programs, projects, and activities; and

(B) sets forth the allocation of such funds required to implement section 7372 of this title;

(2) describes how assistance under this subchapter will contribute to meeting the National Education Goals and improving student achievement or improving the quality of education for students;

(3) provide assurances of compliance with the provisions of this subchapter, including the participation of children enrolled in private, nonprofit schools in accordance with section 7372 of this title;

(4) agrees to keep such records, and provide such information to the State educational agency as reasonably may be required for fiscal audit and program evaluation, consistent with the responsibilities of the State agency under this subchapter; and

(5) provides in the allocation of funds for the assistance authorized by this subchapter, and in the design, planning and implementation of such programs, for systematic consultation with parents of children attending elementary and secondary schools in the area served by the local educational agency, with teachers and administrative personnel in such schools, and with other groups involved in the implementation of this subchapter (such as librarians, school counselors, and other pupil services personnel) as may be considered appropriate by the local educational agency.

(b) Period of application

An application filed by a local educational agency under subsection (a) of this section shall be for a period not to exceed three fiscal years, may provide for the allocation of funds to programs for a period of three years, and may be amended annually as may be necessary to reflect changes without filing a new application.

(c) Local educational agency discretion

Subject to the limitations and requirements of this subchapter, a local educational agency shall have complete discretion in determining how funds under this part shall be divided among the areas of targeted assistance. In exercising such discretion, a local educational agency shall ensure that expenditures under this part carry out the purposes of this subchapter and are used to meet the educational needs within the schools of such local educational agency.

§ 7371. Maintenance of effort; Federal funds supplementary

(a) Maintenance of effort

(1) In general

Except as provided in paragraph (2), a State is entitled to receive its full allocation of funds under this part for any fiscal year if the Secretary finds that either the combined fiscal effort per student or the aggregate expenditures within the State with respect to the provision of free public education for the fiscal year preceding the fiscal year for which the determination is made was not less than 90 percent of such combined fiscal effort or aggregate

expenditures for the second fiscal year preceding the fiscal year for which the determination is made.

(2) Reduction of funds

The Secretary shall reduce the amount of the allocation of funds under this part in any fiscal year in the exact proportion to which the State fails to meet the requirements of paragraph (1) by falling below 90 percent of both the fiscal effort per student and aggregate expenditures (using the measure most favorable to the State), and no such lesser amount shall be used for computing the effort required under paragraph (1) for subsequent years.

(3) Waivers

The State or local educational agency may use and allocate funds received under this part only so as to supplement and, to the extent practical, increase the level of funds that would, in the absence of Federal funds made available under this part, be made available from non-Federal sources, and in no case may such funds be used so as to supplant funds from non-Federal sources.

§ 7372. Participation of children enrolled in private schools

(a) Participation on equitable basis

(1) In general

To the extent consistent with the number of children in the school district of a local educational agency which is eligible to receive funds under this subchapter or which serves the area in which a program or project assisted under this subchapter is located who are enrolled in private

nonprofit elementary and secondary schools, or with respect to instructional or personnel training programs funded by the State educational agency from funds made available for State use, such agency, after consultation with appropriate private school officials, shall provide for the benefit of such children in such schools secular, neutral, and nonideological services, materials, and equipment, including the participation of the teachers of such children (and other educational personnel serving such children) in training programs, and the repair, minor remodeling, or construction of public facilities as may be necessary for their provision (consistent with subsection (c) of this section), or if such services, materials, and equipment are not feasible or necessary in one or more such private schools as determined by the local educational agency after consultation with the appropriate private school officials, shall provide such other arrangements as will assure equitable participation of such children in the purposes and benefits of this subchapter.

(2) Other provisions for services

If no program or project is carried out under paragraph (1) in the school district of a local educational agency, the State educational agency shall make arrangements, such as through contracts with non-profit agencies or organizations, under which children in private schools in such district are provided with services and materials to the extent that would have occurred if the local educational agency had received funds under this subchapter.

(3) Application of requirements

The requirements of this section relating to the participation of children, teachers, and other personnel serving such children shall apply to programs and projects carried out under this subchapter by a State or local

educational agency, whether directly or through grants to or contracts with other public or private agencies, institutions, or organizations.

(b) Equal expenditures

Expenditures for programs pursuant to subsection (a) of this section shall be equal (consistent with the number of children to be served) to expenditures for programs under this subchapter for children enrolled in the public schools of the local educational agency, taking into account the needs of the individual children and other factors which relate to such expenditures, and when funds available to a local educational agency under this subchapter are used to concentrate programs or projects on a particular group, attendance area, or grade or age level, children enrolled in private schools who are included within the group, attendance area, or grade or age level selected for such concentration shall, after consultation with the appropriate private school officials, be assured equitable participation in the purposes and benefits of such programs or projects.

(c) Funds

(1) Administration of funds and property

The control of funds provided under this subchapter, and title to materials, equipment, and property repaired, remodeled, or constructed with such funds, shall be in a public agency for the uses and purposes provided in this subchapter, and a public agency shall administer such funds and property.

(2) Provision of services

The provision of services pursuant to this subchapter shall be provided by employees of a public agency or through contract by such public agency with a person, an association, agency, or corporation who or which, in the provision of such services, is independent of such private school and of any religious organizations, and such employment or contract shall be under the control and supervision of such public agency, and the funds provided under this subchapter shall not be commingled with State or local funds.

(d) State prohibition waiver

If by reason of any provision of law a State or local educational agency is prohibited from providing for the participation in programs of children enrolled in private elementary and secondary schools, as required by this section, the Secretary shall waive such requirements and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of this section.

(e) Waiver and provision of services

(1) Failure to comply

If the Secretary determines that a State or a local educational agency has substantially failed or is unwilling to provide for the participation on an equitable basis of children enrolled in private elementary and secondary schools as required by this section, the Secretary may waive such requirements and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of this section.

(2) Withholding of allocation

Pending final resolution of any investigation or complaint that could result in a determination under this subsection or subsection (d) of this section, the Secretary may withhold from the allocation of the affected State or local educational agency the amount estimated by the Secretary to be necessary to pay the cost of those services.

(f) Determination

Any determination by the Secretary under this section shall continue in effect until the Secretary determines that there will no longer be any failure or inability on the part of the State or local educational agency to meet the requirements of subsections (a) and (b) of this section.

(g) Payment from State allotment

When the Secretary arranges for services pursuant to this section, the Secretary shall, after consultation with the appropriate public and private school officials, pay the cost of such services, including the administrative costs of arranging for those services, from the appropriate allotment of the State under this subchapter.

(h) Review

(1) Written objections

The Secretary shall not take any final action under this section until the State educational agency and the local educational agency affected by such action have had an opportunity, for not less than 45 days after receiving written notice thereof, to submit written objections and to appear

before the Secretary or the Secretary's designee to show cause why that action should not be taken.

(2) Court Action

If a State or local educational agency is dissatisfied with the Secretary's final action after a proceeding under paragraph (1), such agency may, not later than 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based this action, as provided in section 2112 of Title 28.

(3) Remand to Secretary

The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence and the Secretary may make new or modified findings of fact and may modify the Secretary's previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(4) Court review

Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Secretary or to set such action aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(i) Prior determination

Any bypass determination by the Secretary under division 2 of subchapter I of chapter 47 of this title (as such division was in effect on the day preceding October 20, 1994) shall, to the extent consistent with the purposes of this subchapter, apply to programs under this subcnapter.

§ 7373. Federal administration

(a) Technical assistance

The Secretary, upon request, shall provide technical assistance to State and local educational agencies under this subchapter.

(b) Rulemaking

The Secretary shall issue regulations under this subchapter only to the extent that such regulations are necessary to ensure that there is compliance with the specific requirements and assurances required by this subchapter.

(c) Availability of appropriations

Notwithstanding any other provision of law, unless expressly in limitation of this subsection, funds appropriated in any fiscal year to carry out activities under this subchapter shall become available for obligation on July 1 of such fiscal year and shall remain available for obligation until the end of the subsequent fiscal year.

34 C.F.R. §299.1, *et seq.*

PART 299—GENERAL PROVISIONS

Subpart A—Purpose and Applicability

Sec.

299.1 What are the purpose and scope of these regulations?

299.2 What general administrative regulations apply to ESEA programs?

Subpart B—Selection Criteria

299.3 What priority may the Secretary establish for activities in an Empowerment Zone or Enterprise Community?

Subpart C—Consolidation of State and Local Administrative Funds

299.4 What requirements apply to the consolidation of State and local administrative funds?

Subpart D—Fiscal Requirements

299.5 What maintenance of effort requirements apply to ESEA programs?

Subpart E—Services to Private School Students and Teachers

299.6 What are the responsibilities of a recipient of funds for providing services to children and teachers in private schools?

299.7 What are the factors for determining equitable participation of children and teachers in private schools?

299.8 What are the requirements to ensure that funds do not benefit a private school?

299.9 What are the requirements concerning property, equipment, and supplies for the benefit of private school children and teachers?

Subpart F—Complaint Procedures

299.10 What complaint procedures shall an SEA adopt?

299.11 What items are included in the complaint procedures?

299.12 How does an organization or individual file a complaint?

AUTHORITY: 20 U.S.C. 1221e-3(a)(1), 6511(a), and 7373(b), unless otherwise noted.

Source: 62 FR 28252, May 22, 1997, unless otherwise noted.

Subpart A—Purpose and Applicability

§ 299.1 What are the purpose and scope of these regulations?

(a) This part establishes uniform administrative rules for programs in titles I through XIII of the Elementary and Secondary Education Act of 1965, as amended (ESEA). As

indicated in particular sections of this part, certain provisions apply only to a specific group of programs.

(b) If an ESEA program does not have implementing regulations, the Secretary implements the program under the authorizing statute, and, to the extent applicable, title XIV of ESEA, the General Education Provisions Act, the regulations in this part, and the Education Department General Administrative Regulations (34 CFR parts 74 through 86) that are not inconsistent with specific statutory provisions of ESEA.

(Authority: 20 U.S.C. 1221e–3(a)(1))

§ 299.2 What general administrative regulations apply to ESEA programs?

With regard to the applicability of Education Department General Administrative Regulations (EDGAR) in part 80 to the ESEA programs except for title VIII programs (Impact Aid) (in addition to any other specific implementing regulations):

(a) 34 CFR part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments) applies to State, local, and Indian tribal governments under direct grant programs (as defined in 34 CFR 75.1(b)), and programs under title XI of ESEA.

(b) 34 CFR part 80 also applies to State, local, and Indian tribal governments under all other programs under the ESEA and to programs under title III of the Goals 2000: Educate America Act (title III of Goals 2000), unless a State formally adopts its own written fiscal and administrative requirements for expending and accounting for all funds

received by State educational agencies (SEAs) and local educational agencies (LEAs) under the ESEA and title III of Goals 2000. If a State adopts its own alternative requirements, the requirements must be available for inspection upon the request of the Secretary or the Secretary's representatives and must—

(1) Be sufficiently specific to ensure that funds received under ESEA and title III of Goals 2000 are used in compliance with all applicable statutory and regulatory provisions;

(2) Ensure that funds received for programs under ESEA and title III of Goals 2000 are spent only for reasonable and necessary costs of operating those programs; and

(3) Ensure that funds received under ESEA and title III of Goals 2000 are not used for general expenses required to carry out other responsibilities of State or local governments.

NOTE: 34 CFR 222.13 indicates which EDGAR provisions apply to title VIII programs (Impact Aid).

NOTE: To meet the first of the three standards, alternative State provisions must, among other things, ensure that costs are allocable to a particular cost objective.

(Authority: 20 U.S.C. 1221e–3(a)(1))

Subpart B—Selection Criteria

§ 299.3 What priority may the Secretary establish for activities in an Empowerment Zone or Enterprise Community?

For any ESEA discretionary grant program, the Secretary may establish a priority, as authorized by 34 CFR 75.105(b), for projects that will—

(a) Use a significant portion of the program funds to address substantial problems in an Empowerment Zone, including a Supplemental Empowerment Zone, or an Enterprise Community designated by the United States Department of Housing and Urban Development or the United States Department of Agriculture; and

(b) Contribute to systemic educational reform in such an Empowerment Zone, including a Supplemental Empowerment Zone, or such an Enterprise Community, and are made an integral part of the Zone or Community's comprehensive community revitalization strategies.

(Authority: 20 U.S.C. 2831(a))

Subpart C—Consolidation of State and Local Administrative Funds

§ 299.4 What requirements apply to the consolidation of State and local administrative funds?

An SEA may adopt and use its own reasonable standards in determining whether—

(a) The majority of its resources for administrative purposes comes from non-Federal sources to permit the consolidation of State administrative funds in accordance with section 14201 of the Act; and

(b) To approve an LEA's consolidation of its administrative funds in accordance with section 14203 of the Act.

(Authority: 20 U.S.C. 8821 and 8823)

Subpart D—Fiscal Requirements

§ 299.5 What maintenance of effort requirements apply to ESEA programs?

(a) *General.* An LEA receiving funds under an applicable program listed in paragraph (b) of this section may receive its full allocation of funds only if the SEA finds that either the combined fiscal effort per student or the aggregate expenditures of State and local funds with respect to the provision of free public education in the LEA for the preceding fiscal year was not less than 90 percent of the combined fiscal effort per student or the aggregate expenditures for the second preceding fiscal year.

(b) *Applicable programs.* This subpart is applicable to the following programs:

(1) Part A of title I (Improving Basic Programs Operated by Local Educational Agencies).

(2) Title II (Eisenhower Professional Development Program) (other than section 2103 and part C of this title).

(3) Subpart 2 of part A of title III (State and Local Programs for School Technology Resources).

(4) Part A of title IV (Safe and Drug-Free Schools and Communities) (other than section 4114).

(c) *Meaning of "preceding fiscal year"*. For purposes of determining if the requirement of paragraph (a) of this section is met, the "preceding fiscal year" means the Federal fiscal year, or the 12-month fiscal period most commonly used in a state for official reporting purposes, prior to the beginning of the Federal fiscal year in which funds are available for obligation by the Department.

Example: For fiscal year 1995 funds that are first made available on July 1, 1995, if a State is using the Federal fiscal year, the "preceding fiscal year" is Federal fiscal year 1994 (which began on October 1, 1993 and ended September 30, 1994) and the "second preceding fiscal year" is Federal fiscal year 1993 (which began on October 1, 1992). If a State is using a fiscal year that begins on July 1, 1995, the "preceding fiscal year" is the 12-month period ending on June 30, 1994, and the "second preceding fiscal year" is the period ending on June 30, 1993.

(d) *Expenditures*. (1) In determining an LEA's compliance with paragraph (a) of this section, the SEA shall consider only the LEA's expenditures from State and local funds for free public education. These include expenditures for administration, instruction, attendance and health services, pupil transportation services, operation and maintenance of plant, fixed charges, and net expenditures to cover deficits for food services and student body activities.

(2) The SEA may not consider the following expenditures in determining an LEA's compliance with the requirements in paragraph (a) of this section:

(i) Any expenditures for community services, capital outlay, debt service or supplemental expenses made as a result of a Presidentially declared disaster.

(ii) Any expenditures made from funds provided by the Federal Government.

(Authority: 20 U.S.C. 8891)

Subpart E—Services to Private School Students and Teachers

§ 299.6 What are the responsibilities of a recipient of funds for providing services to children and teachers in private schools?

(a) *General*. An agency or consortium of agencies receiving funds under an applicable program listed in paragraph (b) of this section, after timely and meaningful consultation with appropriate private school officials (in accordance with the statute), shall provide special educational services or other benefits under this subpart on an equitable basis to eligible children who are enrolled in private elementary and secondary schools, and to their teachers and other educational personnel.

(b) *Applicable programs*. This subpart is applicable to the following programs:

(1) Part C of title I (Migrant Education).

(2) Title II (Professional Development) (other than section 2103 and part C of this title).

(3) Title III (Technology for Education) (other than part B of this title) (Star Schools).

(4) Part A of title IV (Safe and Drug-Free Schools and Communities) (other than section 4114).

(5) Title VI (Innovative Education Program Strategies).

(6) Title VII (Bilingual Education).

(c) *Provisions not applicable.* Sections 75.650 and 76.650 through 76.662 of title 34 of the Code of Federal Regulations (participation of students enrolled in private schools) do not apply to programs listed in paragraph (b) of this section.

(Authority: 20 U.S.C. 8893)

§ 299.7 What are the factors for determining equitable participation of children and teachers in private schools?

(a) *Equal expenditures.* (1) Expenditures of funds made by an agency or consortium of agencies under a program listed in § 299.6(b) for services for eligible private school children and their teachers and other educational personnel must be equal on a per-pupil basis to the amount of funds expended for participating public school children and their teachers and other educational personnel, taking into account the number and educational needs of those children and their teachers and other educational personnel.

(2) Before determining equal expenditures under paragraph (a)(1) of this section, an agency or consortium of agencies shall pay for the reasonable and necessary administrative costs of providing services to public and private school children and their teachers and other educational personnel from the agency's or consortium of agencies' total allocation of funds under the applicable ESEA program.

(b) *Services on an equitable basis.* (1) The services that an agency or consortium of agencies provides to eligible private school children and their teachers and other educational personnel must also be equitable in comparison to the services and other benefits provided to public school children and their teachers or other educational personnel participating in a program under this subpart.

(2) Services are equitable if the agency or consortium of agencies—

(i) Addresses and assesses the specific needs and educational progress of eligible private school children and their teachers and other educational personnel on a comparable basis to public school children and their teachers and other educational personnel;

(ii) Determines the number of students and their teachers and other educational personnel to be served on an equitable basis;

(iii) Meets the equal expenditure requirements under paragraph (a) of this section; and

(iv) Provides private school children and their teachers and other educational personnel with an opportunity to participate that—

(A) Is equitable to the opportunity and benefits provided to public school children and their teachers and other educational personnel; and

(B) Provides reasonable promise of participating private school children meeting challenging academic standards called for by the State's student performance standards and of private school teachers and other educational personnel assisting their students in meeting high standards.

(3) The Agency or consortium of agencies shall make the final decisions with respect to the services to be provided to eligible private school children and their teachers and the other educational personnel.

(c) If the needs of private school children, their teachers and other educational personnel are different from the needs of children, teachers and other educational personnel in the public schools, the agency or consortium of agencies shall provide program benefits for the private school children, teachers, and other educational personnel that are different from the benefits it provides for the public school children and their teachers and other educational personnel.

(Authority: 20 U.S.C. 8893)

§ 299.8 What are the requirements to ensure that funds do not benefit a private school?

(a) An agency or consortium of agencies shall use funds under a program listed in § 299.6(b) to provide services that supplement, and in no case supplant, the level of services that would, in the absence of services provided under that program, be available to participating children and their teachers and other educational personnel in private schools.

(b) An agency or consortium of agencies shall use funds under a program listed in § 299.6(b) to meet the special educational needs of participating children who attend a private school and their teachers and other educational personnel, but may not use those funds for —

(1) The needs of the private school; or

(2) The general needs of children and their teachers and other educational personnel in the private school.

(Authority: 20 U.S.C. 8893)

§ 299.9 What are the requirements concerning property, equipment, and supplies for the benefit of private school children and teachers?

(a) A public agency must keep title to, and exercise continuing administrative control of, all property, equipment, and supplies that the public agency acquires with funds under a program listed in § 299.6(b) for the benefit of eligible private school children and their teachers and other educational personnel.

(b) The public agency may place equipment and supplies in a private school for the period of time needed for the program.

(c) The public agency shall ensure that the equipment and supplies placed in a private school —

(1) Are used only for proper purposes of the program; and

(2) Can be removed from the private school without remodeling the private school facility.

(d) The public agency must remove equipment and supplies from a private school if—

(1) The equipment and supplies are no longer needed for the purpose of the program; or

(2) Removal is necessary to avoid unauthorized use of the equipment or supplies for other than the purposes of the program.

(e) No funds may be used for repairs, minor remodeling, or construction of private school facilities.

(f) For the purpose of this section, the term *public agency* includes the agency or consortium of agencies.

(Authority: 20 U.S.C. 8893)

Subpart F—Complaint Procedures

§ 299.10 What complaint procedures shall an SEA adopt?

(a) *General.* An SEA shall adopt written procedures, consistent with State law, for—

(1) Receiving and resolving any complaint from an organization or individual that the SEA or an agency or consortium of agencies is violating a Federal statute or regulation that applies to an applicable program listed in paragraph (b) of this section;

(2) Reviewing an appeal from a decision of an agency or consortium of agencies with respect to a complaint; and

(3) Conducting an independent on-site investigation of a complaint if the SEA determines that an on-site investigation is necessary.

(b) *Applicable programs.* This subpart is applicable to the following programs:

(1) Part A of title I (Improving Basic Programs Operated by Local educational Agencies.)

(2) Part B of title I (Even Start Family Literacy Programs) (other than the federally administered direct grants for Indian tribes and tribal organizations, children of migratory workers, Statewide family literacy initiatives, and a prison that house women and children).

(3) Part C of title I (Migrant Education).

(4) Part D of title I (Children and Youth Who Are Neglected, Delinquent, or At Risk of Dropping Out).

(5) Title II (Eisenhower Professional Development Program) (other than section 2103 and part C of this title).

(6) Subpart 2 of part A of title III (State and Local Programs for School Technology Resources).

(7) Part A of title IV (Safe and Drug-Free Schools and Communities) (other than section 4114).

(8) Title VI (Innovative Education Program Strategies).

(9) Part C of title VII (Emergency Immigrant Education)

(Approved by the Office of Management and Budget under OMB control number 1810-0591)

(Authority: 20 U.S.C. 1221e-3(a)(1), 8895)

§ 299.11 What items are included in the complaint procedures?

An SEA shall include the following in its complaint procedures:

(a) A reasonable time limit after the SEA receives a complaint for resolving the complaint in writing, including a provision for carrying out an independent on-site investigation, if necessary.

(b) An extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint.

(c) The right for the complainant to request the Secretary to review the final decision of the SEA, at the Secretary's discretion. In matters involving violations of section 14503 (participation of private school children), the Secretary will follow the procedures in section 14505(b).

(Approved by the Office of Management and Budget under OMB control number 1810-0591)

(d) A requirement for LEAs to disseminate, free of charge, adequate information about the complaint procedures to parents of students, and appropriate private school officials or representatives.

(Authority: 20 U.S.C. 1221e-3(a)(1), 8895)

§ 299.12 How does an organization or individual file a complaint?

An organization or individual may file a written signed complaint with an SEA. The complaint must be in writing and signed by the complainant, and include—

(a) A statement that the SEA or an agency or consortium of agencies has violated a requirement of a Federal statute or regulation that applies to an applicable program; and

(b) The facts on which the statement is based and the specific requirement allegedly violated.

(Approved by the Office of Management and Budget under OMB control number 1810-0591)

(Authority: 20 U.S.C. 1221e-3(a)(1), 8895)